III. PUBLIC INTEREST ANALYSIS

A. Framework for Analysis

16. In considering the Applications, the Commission must determine, pursuant to section 214(a) and section 310(d) of the Act whether the proposed transfers of control will serve the public interest.[64] In addition, because Global Crossing seeks to transfer ultimate control of its ownership interests in cable landing licenses, we review the proposed transaction under the Cable Landing License Act.[65] Finally, because of the foreign ownership interests presented in this case, we also must determine whether the proposed transfer of control of wireless licensees GCNAN and EAN is permissible under the foreign ownership provisions of section 310 of the Act.[66]

17. The legal standards that govern our public interest analysis for transfer of control of authorizations and licenses under sections 214(a) and 310(d) require that we weigh the potential public interest harms against the potential public interest benefits to ensure that, on balance, the proposed transaction will serve the public interest, convenience, and necessity.[67] Our analysis considers the likely

(Continued from previous page) will be made to the Commission should subsequent events warrant the further transfer of the cable landing license. *See* December 18 Letter, *supra* note 10, at 4. On August 18, 2003, Applicants further advised that PC Landing's asset sale has not yet closed and, although Asia Global Crossing has completed the sale of substantially all of its operating subsidiaries, the Asia Global Crossing transaction has not yet affected Global Crossing's ownership interest in PC Landing, which interest will remain intact until either the PC Landing reorganization concludes or the AGCL Chapter 7 trustee abandons its equity interests in PC Landing. *See* August 18 Letter, *supra* note 62, at 2-3; *see also* Letter from Jean L. Kiddoo and Paul O. Gagnier, Counsel for Applicants, to Secretary, Federal Communications Commission (filed Mar. 20, 2003) ("March 20 Letter"), at 1, Global Crossing Reply to XO Comments, *supra* note 14, at 4-5. Thus, Applicants state that Commission approval to transfer control of Global Crossing's interest in the PC-1 cable landing license held by PC Landing continues to be required. *See* March 20 Letter at 1, Global Crossing Reply to XO Comments, *supra* note 14, at 4, August 18 Letter, *supra* note 62, at 3.

[64] 47 U.S.C. §§ 214(a), 310(d).

[65] *See also* Executive Order No. 10530, Exec. Ord. No. 10530, § 5(a), *reprinted as amended in* 3 U.S.C. §301 ("Executive Order 10530"); *Review of Commission Consideration of Applications under the Cable Landing License Act*, Report and Order, IB Docket No. 00-106, FCC 01-332, 16 FCC Rcd 22167, 22169-70, ¶ 5 (2001) ("*Submarine Cable Report and Order*"); 47 C.F.R. § 1.767(b); *Streamlined Procedures for Executive Branch Review of Submarine Cable Landing License Requests*, Media Note (Revised) (Dec. 20, 2001), *available at* www.state.gov/r/pa/prs/ps/2001 (visited March 28, 2003). Pursuant to section 1.767(b) of the Commission's rules, the Cable Landing License Act, and Executive Order 10530, we informed the Department of State of the Submarine Cable Application.

[66] 47 U.S.C. § 310(a), (b).

[67] *See, e.g.*, *Application of VoiceStream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and for Declaratory Ruling Pursuant to Section 310 of the Communications Act*, Memorandum Opinion and Order, FCC 01-142, 16 FCC Rcd 9779, 9789, ¶ 17 (2001) ("*VoiceStream/Deutsche Telekom Order*"). *See also AT&T Corp., British Telecommunications, PLC, VLT Co. LLC, Violet License Co. LLC, and TNV (Bahamas) Limited, Applications For Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, PLC*, Memorandum Opinion and Order, FCC 99-313, 14 FCC Rcd 19140, 19147, ¶ 15 (1999) ("*AT&T/BT Order*"), *Motient Services Inc. and TMI Communications and* (continued ...)

competitive effects of the proposed transfers and whether such transfers raise significant anti-competitive issues.[68] In addition, we consider the efficiencies and other public interest benefits that are likely to result from the proposed transfers of control of the licenses and authorizations.[69] Further, we consider any national security, law enforcement, foreign policy or trade policy concerns brought to our attention by the Executive Branch.[70] Similarly, our review pursuant to the Cable Landing License Act considers the competitive effects and public interest benefits of the proposed transaction, as well as any national security, law enforcement, foreign policy or trade policy concerns raised by the Executive Branch.[71]

B. Qualifications of Applicants

18. As a threshold matter, we must determine whether the Applicants have the requisite qualifications to hold and transfer control of licenses under section 310(d) of the Act and Commission rules.[72] In making this determination, we do not, as a general rule, re-evaluate the qualifications of a transferor unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.[73] We conclude that no such issues have been raised here that would require us to designate a hearing to re-evaluate the basic qualifications of the transferor, Global Crossing.[74] Conversely, the analysis of every

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Company, LP, Assignors, and Mobile Satellite Ventures Subsidiary LLC, Assignee, Order and Authorization, DA 01-2732, 16 FCC Rcd 20469, 20473, ¶ 11 (Int'l Bur 2001).

68 *See, e.g., AT&T/BT Order*, 14 FCC Rcd at 19148, ¶ 15.

69 *See, e.g., VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd at 9789, ¶ 17.

70 *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23891, 23919-21, ¶¶ 61-66 (1997) ("*Foreign Participation Order*"), Order on Reconsideration, FCC 00-339, 15 FCC Rcd 18158 (2000).

71 *See Foreign Participation Order*, 12 FCC Rcd at 23933-35, ¶¶ 93-96, 23919-21, 61-66.

72 47 C.F.R. § 310(d), 47 C.F.R. § 1.948 (transfer of control of wireless licenses).

73 *See, e.g., VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd at 9790, ¶ 19.

74 CWA alleges that Global Crossing's "knowledge and expertise" resulted in the company's bankruptcy and losses to Global Crossing's employees, investors, and creditors. *See* CWA Comments, *supra* note 36, at 3. ACNI alleges that Global Crossing refuses to honor the contract laws of the United States. *See* ACNI Statement, *supra* note 39, at 20. In evaluating character qualifications of applicants, the Commission considers misconduct that violates the Communications Act or a Commission rule or policy and certain adjudicated non-FCC-related behavior that allows the Commission to predict whether an applicant has or lacks the character traits of truthfulness and reliability. *See Policy Regarding Character Qualifications in Broadcast Licenses*, Report, Order and Policy Statement, FCC 85-648, 102 F.C.C. 2d 1179, 1190-91, ¶ 23, 1195, ¶ 34 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 21 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. 1978), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992). *See also MCI Telecommunications Corp., Petition for Revocation of Operating Authority*, Order and Notice of Apparent Liability, FCC 88-24, 3 FCC Rcd 509, 515 n.14 (1988) (character qualification standards adopted in broadcast context can provide guidance in common carrier context); *Lockheed Martin Corporation, COMSAT Government Systems, LLC, and COMSAT Corporation, Applications for Transfer of Control of COMSAT Corporation and its Subsidiaries, Licensees of Various Satellite, Earth Station, Private Land Mobile Radio and Experimental Licenses and Holders of International Section 214 Authorizations*, Order on Reconsideration, FCC 02-197, 17 FCC Rcd 13160, 13167, ¶
(continued....)

transfer application requires that we determine whether the proposed transferee is qualified to hold Commission licenses[75] Section 310(d) requires the Commission to consider the qualifications of the proposed transferee as if the transferee were applying for the license directly under section 308 of the Act[76] Although IDT argues that the Applicants have failed to file the requisite information for the Commission to make a determination, we disagree[77] No other party has challenged the basic qualifications of the transferee in this transaction, New GX, and our independent review finds no evidence to suggest that New GX lacks the requisite financial, technical, legal, or other basic qualifications to control GCNAN and EAN[78] Thus, we find that New GX possesses the basic

(Continued from previous page)

17 (2002) (Commission has recognized that prior misconduct can have material bearing on qualifications for non-broadcast as well as broadcast licensees and has assessed the relevance of such matters consistent with its broadcast character policy statement) Under this line of policy guidance, the allegations raised by CWA fall short of giving rise to an issue of Global Crossing's qualifications to hold and transfer wireless authorizations We are not aware of adjudicated non-FCC-related behavior that would bear upon the qualifications of Global Crossing to hold and transfer the wireless authorizations involved in this docketed proceeding Likewise, as discussed below, see ¶¶ 52-54, we deny ACNI's request that we modify the contracts with GC Bandwidth, and do not reach ACNI's argument that Global Crossing refused to honor contract law

[75] *See* 47 U S C §§ 310(d), 308(b) (applications must set forth such facts as the Commission may require as to citizenship character, and financial, technical and other qualifications), ***see also Applications of AirTouch Communications, Inc , Transferor, and Vodafone Group, PLC, Transferee, For Consent to Transfer of Control of Licenses and Authorizations***, Memorandum Opinion and Order, File Nos 0000003690 ***et al***, DA 99-1200 14 FCC Rcd 9430, 9432-34, ¶¶ 5-9 (WTB 1999)

[76] *See* 47 U S C § 310(d)

[77] Our review of the Applications finds no basis to conclude that the ownership information submitted by the Applications is either insufficient or otherwise incomplete for purposes of evaluating New GX's qualifications Specifically, IDT alleges that the Applicants' Form 603 ownership filings do not contain "required attributable ownership information regarding officers and directors" *See* IDT Reply to Third Amendment, ***supra*** note 56 at 5 n 13 We note, however that our rules do not require the disclosure of "attributable ownership information" for officers and directors in this context Rather, what is required is the disclosure of the real party (or parties) in interest to an application, including a disclosure of those persons or entities directly or indirectly owning or controlling the applicant or licensee We believe that the Applications satisfy this requirement. Similarly with respect to IDT's argument that Applicants must provide the names of the officers and directors of each of the Singapore entities—including ST Telemedia, Singapore Technologies, Temasek and SingTel—in order to determine the extent of interlocking directorates, *see* IDT Petition to Deny Third Amendment, ***supra*** note 49, at 6 we note that the Commission's foreign carrier affiliation rules require the Applicants to provide information on any interlocking directorates between the transferee, New GX, and foreign carriers, not among the various Singapore companies and not with respect to the two domestic wireless licensees at issue here In any case, this Order and Authorization conditions the transfer of control of the international section 214 authorizations and submarine cable licenses on a requirement that New GX provide an updated interlocking directorate certification, pursuant to parts 63 and 1 of the rules within five business days after appointment of its board of directors and the boards of directors of the international section 214 and submarine cable subsidiaries or within five business days of release of this Order and Authorization whichever occurs later *See* 47 C F R §§ 63 24(e)(2), 63 18(h), 63 09(g), 1 767(a)(8), (11), *see also Williams Communications, LLC, Licensee, Williams Communications Group, Inc , Transferor, and Williams Communications Group Inc (Debtor-in-Possession), Transferee and Transferor, Nunc Pro Tunc Pro Forma Transfer of Control and Transfer of Control*, DA 02-3246, 17 FCC Rcd 23808, 23809 (Int'l Bur 2002) (interlocking directorate certification condition) *See also infra* ¶ 63

[78] We address elsewhere in this Order and Authorization the argument that foreign investment in New GX raises potential foreign ownership or national security concerns *See infra* at ¶¶ 19-35, 46-51

qualifications to control wireless licensees GCNAN and EAN

C. Foreign Ownership Review

19 In this section, we address issues relevant to our public interest inquiry under the foreign ownership provisions of section 310 of the Act New GX requests a ruling, pursuant to section 310(b)(4) of the Act, that it would not serve the public interest for the Commission to prohibit ST Telemedia from acquiring, through New GX, indirect ownership interests in common carrier wireless licensees GCNAN and EAN in excess of the statutory 25 percent foreign ownership benchmark Specifically, New GX asks that the ruling (1) permit the "unlimited" indirect foreign ownership of GCNAN and EAN by ST Telemedia, and (2) allow GCNAN and EAN to accept up to and including additional, aggregate 25 percent indirect equity and voting interests from other unnamed foreign investors, except that no single foreign investor, with the exception of ST Telemedia, may acquire indirect foreign ownership of GCNAN and EAN in excess of 25 percent without prior Commission approval under section 310(b)(4).[79] In support of the requested ruling, New GX asserts that the proposed investment by ST Telemedia is attributable to a World Trade Organization ("WTO") Member – Singapore – and, therefore, ST Telemedia is entitled to a rebuttable presumption that the proposed investment in New GX does not raise competitive concerns [80]

20 Based on the record before us, we conclude that it would not serve the public interest to deny the transfer of control of the licenses held by GCNAN and EAN because of the proposed indirect foreign ownership interests that would be held by and through New GX and its wholly-owned subsidiary GC Holdings We therefore grant New GX s petition for declaratory ruling under section 310(b)(4) to the extent specified below Relying on Commission precedent, we find that we should not consider the proposed transfers of control under section 310(a) and 310(b)(1)-(b)(3) of the Act [81] Given Commission

[79] *See* Petition for Declaratory Ruling, *supra* note 1, at 25-26, as amended by Third Amendment, *supra* note 1, at 3 n 6, and as further amended by the Fourth Amendment, *supra* note 1, at 1.

[80] *See* Petition for Declaratory Ruling *supra* note 1, at 16-18 and 26, as amended by Third Amendment, *supra* note 1, at 7 (asserting that, as company from WTO Member country, ST Telemedia is entitled to presumption that proposed investment in New GX is in the public interest and nothing in the record raises exceptional circumstances that would rebut presumption) Applicants also state that Singapore is one of the largest trading partners of the United States and is a key strategic U S ally in the Asia-Pacific Region *See* Third Amendment, *supra* note 1, at 8 & 8 nn 18-20 Applicants contend that the proposed transaction is the kind of investment envisioned by the U S -Singapore Free Trade Agreement signed on May 6, 2003 *See id* at 8 & 8 n.19.

[81] Section 310(a) of the Act prohibits any radio license from being "granted to or held by" a foreign government or its representative. *See* 47 U S C § 310(a) The ownership structure proposed by New GX is such that no foreign government or its representative will hold any of the radio licenses Section 310(b)(1)-(2) of the Act prohibits common carrier, broadcast and aeronautical fixed or *en route* radio licenses from being "granted to or held by" aliens, or their representatives or foreign corporations *See* 47 U.S.C § 310(b)(1), (b)(2) According to the Applications, no alien, representative, or foreign corporation will hold any of the common carrier licenses Accordingly we find that the proposed transaction is not inconsistent with the foreign ownership provisions of section 310(a) and 310(b)(1)-(b)(2) of the Act *See VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd at 9804-9809, ¶¶ 38-48 (issues related to indirect foreign ownership of common carrier licensees are addressed under section 310(b)(4)) Additionally, because the proposed transaction does not involve direct foreign investment in GCNAN and EAN, the common carrier wireless licensees, it does not trigger section 310(b)(3) of the Act, which places a 20 percent limit on direct alien, foreign corporate or government ownership of entities that hold common carrier, broadcast and aeronautical fixed or *en route* Title III licenses. *See* 47 U S C § 310(b)(3)

precedent, we dismiss the arguments of ACNI and IDT that we must consider the transfer of control of the wireless licenses under section 310(a).[82]

1. Legal Standard for Foreign Ownership of Radio Licensees

21 Section 310(b)(4) of the Act establishes a 25 percent benchmark for indirect, attributable investment by foreign individuals, corporations, and governments in U S common carrier radio licensees, but grants the Commission discretion to allow higher levels of foreign ownership if it determines that such ownership is not inconsistent with the public interest.[83] The calculation of foreign ownership interests under section 310(b)(4) is a two-pronged analysis in which the Commission examines separately the equity interests and the voting interests in the licensee's parent.[84] The Commission calculates the equity interest of each foreign investor in the parent and then aggregates these interests to determine whether the sum of the foreign equity interests exceeds the statutory benchmark. Similarly, the Commission calculates the voting interest of each foreign investor in the parent and aggregates these voting interests [85] The presence of aggregated alien equity or voting interests in a common carrier licensee's parent in excess of 25 percent triggers the applicability of section 310(b)(4)'s statutory benchmark.[86] Once the benchmark is triggered, section 310(b)(4) directs the Commission to determine whether the "'public interest will be served by the refusal or revocation of such license.'"[87] Applicants identify proposed foreign ownership, through New GX, of Global Crossing North American Holdings, Inc , the U S parent of GCNAN and EAN, that would exceed the 25 percent benchmark set by

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[82] *See* ACNI Objections to Third Amendment, *supra* note 50, at 5 (stating that Third Amendment fails to certify that ST Telemedia is not a foreign government or representative thereof), IDT Petition to Deny Third Amendment, *supra* note 49, at 10-16 (arguing that Commission precedent is erroneous), IDT Reply to Third Amendment, *supra* note 56, at 22 (arguing that "past Commission decisions do not provide a solid basis on which to confirm the distinction between Sections 310(a) and 310(b)") *but see* Global Crossing Opposition to Petitions to Deny Third Amendment, *supra* note 52, at 3 (GCNAN and EAN are U S companies that clearly are not foreign governments and will not become representatives of a foreign government) *See also* Sen Burns and Sen. Hollings *Ex Parte*, *supra* note 58, at 1-2 (urging Commission to give thorough consideration to Congressional intent regarding foreign ownership)

[83] *See* 47 U S C § 310(b)(4) (providing that "No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens their representatives, or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest would be served by the refusal or revocation of such license.")

[84] *See BBC License Subsidiary L P* , Memorandum Opinion and Order, DA 95-364, 10 FCC Rcd 10968, 10973, ¶ 22 (1995) ("*BBC License Subsidiary*")

[85] *See id* at 10972, ¶ 20, 10973-74, ¶¶ 22-25

[86] *See, e g , Sprint Corporation, Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended,* Declaratory Ruling and Order, FCC 95-498, 11 FCC Rcd 1850, 1857, ¶ 47 (1995) ("*Sprint Ruling*") *See also BBC License Subsidiary*, 10 FCC Rcd at 10973-74, ¶ 25

[87] *See Sprint Ruling*, 11 FCC Rcd at 1857, ¶ 47 (quoting section 310(b)(4)) It is the licensee's obligation to inform the Commission before its indirect foreign ownership exceeds the 25% benchmark set forth in section 310(b)(4) *See Fox Television Stations, Inc* , Order, FCC 95-188, 10 FCC Rcd 8452, 8474, ¶ 52 (1995)

section 310(b)(4).[88] In addition, New GX itself is a foreign company, as is its wholly-owned subsidiary GC Holdings, which will be the direct parent of Global Crossing North American Holdings, Inc. Thus, the 100 percent direct and indirect ownership interest that would be held by GC Holdings and New GX in Global Crossing North American Holdings, Inc also would exceed the 25 percent benchmark. We therefore must consider the transfer of control to New GX of the common carrier licenses held by GCNAN and EAN under section 310(b)(4) of the Act.

22 In the *Foreign Participation Order*, the Commission concluded that the public interest would be served by permitting greater investment by individuals or entities from WTO Member countries in U.S common carrier and aeronautical fixed and *en route* licensees.[89] Therefore, with respect to indirect foreign investment from WTO Members, the Commission replaced its "effective competitive opportunities," or "ECO," test with a rebuttable presumption that such investment generally raises no competitive concerns.[90] In evaluating an applicant's request for approval of foreign ownership interests under section 310(b)(4), the Commission uses a "principal place of business" test to determine the nationality or "home market" of foreign investors.[91]

23 In light of the policies adopted in the *Foreign Participation Order*, we begin our evaluation of the proposed transaction under section 310(b)(4) by calculating the proposed attributable foreign equity and voting interests in Global Crossing North American Holdings, Inc., the U.S parent of the wireless licensees We then determine whether these foreign interests properly are ascribed to

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[88] GCNAN and EAN are common carrier wireless licensees GCNAN has 25 common carrier licenses and one private carrier wireless license EAN has 20 common carrier point-to-point microwave licenses We note that section 310(b)(4) governs only common carrier, broadcast, and aeronautical *en route* or fixed radio licenses Therefore, we do not consider specifically in our discussion here the proposed transfer of the private radio license held by GCNAN Our findings with respect to competitive effects, *see infra* ¶¶ 36-41, our public interest determination for the common carrier licenses, *see infra* ¶¶ 25-35, and the Executive Branch's resolution of any national security and law enforcement concerns, *see infra* ¶¶ 46-51, collectively suffice to resolve any public interest implications outside our review under section 310(b)(4), to the extent there are any, for the non-common carrier license

[89] *See Foreign Participation Order*, 12 FCC Rcd at 23896, ¶ 9, 23913, ¶ 50, and 23940, ¶¶ 111-12

[90] *See id* at 23896, ¶ 9, 23913, ¶ 50, 23940, ¶ 111-12

[91] To determine a foreign entity's home market for purposes of the public interest determination under section 310(b)(4), the Commission will identify and balance the following factors (1) the country of a foreign entity's incorporation, organization or charter, (2) the nationality of all investment principals, officers, and directors, (3) the country in which the world headquarters is located, (4) the country in which the majority of the tangible property, including production, transmission, billing, information, and control facilities, is located; and (5) the country from which the foreign entity derives the greatest sales and revenues from its operations *See Foreign Participation Order*, 12 FCC Rcd at 23941, ¶ 116 (citing *Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, FCC 95-475, 11 FCC Rcd 3873, 3951, ¶ 207 (1995)). For examples of cases applying the five-factor "principal place of business" test, *see Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Assignor, and Telenor Satellite Mobile Services, Inc, and Telenor Satellite, Inc, Assignee, Applications for Assignment of Section 214 Authorizations, Private Land Mobile Radio Licenses, Experimental Licenses, and Earth Station Licenses and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act*, Order and Authorization, FCC 01-369, 16 FCC Rcd 22897 (2001), *erratum*, DA 02-266, 17 FCC Rcd 2147 (Int'l Bur 2002), *recon denied*, FCC 02-207, 17 FCC Rcd 14030 (2002) ("*Telenor Order*"), *Space Station System Licensee, Inc, Assignor, and Iridium Constellation LLC, Assignee, et al*, Memorandum Opinion Order and Authorization, DA 02-307, 17 FCC Rcd 2271 (Int'l Bur 2002)

individuals or entities that are citizens of or have their principal places of business in, WTO Member countries The Commission has stated, in the *Foreign Participation Order*, that it will deny an application if it finds that more than 25 percent of the ownership of an entity that controls a common carrier radio licensee is attributable to parties whose principal place(s) of business are in non-WTO Member countries that do not offer effective competitive opportunities to U S. investors in the particular service sector in which the applicant seeks to compete in the U.S. market, unless other public interest considerations outweigh that finding [92]

24 In this case, the foreign equity and voting interests in Global Crossing North American Holdings Inc would be held by and through New GX and GC Holdings. In *Wilner & Scheiner* and its progeny, the Commission has set forth a standard for calculating both alien equity and voting interests held in a licensee, or, as here, in the licensees' parent Global Crossing North American Holdings, Inc., where such interests are held through intervening entities [93] In calculating attributable alien equity interests in a parent company, the Commission uses a multiplier to dilute the percentage of each investor's equity interest in the parent company when those interests are held through intervening companies The multiplier is applied to each link in the vertical ownership chain, regardless of whether any particular link in the chain represents a controlling interest in the company positioned in the next lower tier [94] Once the *pro rata* equity interests of each alien investor are calculated, these interests then are aggregated to determine whether the sum of the interests exceeds the statutory benchmark.[95] By contrast, in calculating alien voting interests in a parent company, the multiplier is not applied to any link in the vertical ownership chain that constitutes a controlling interest in the company positioned in the next lower tier [96]

2. Attribution of Foreign Ownership Interests

25 As discussed in Section II above, the proposed transaction contemplates that New GX will succeed to the assets of Global Crossing which include one hundred percent of the equity and voting interests in Global Crossing North American Holdings, Inc . a Delaware corporation that indirectly wholly owns GCNAN and indirectly controls, and owns 86 7 percent equity and voting interests in, EAN [97] In addition, New GX will acquire the remaining 13 3 percent minority equity and voting interests

[92] *See Foreign Participation Order*, 12 FCC Rcd at 23946, ¶ 131

[93] *See generally Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended,* Declaratory Ruling, FCC 85-295, 103 F C C 2d 511 (1985) ("*Wilner & Scheiner I*"), *recon in part,* FCC 86-406, 1 FCC Rcd 12 (1986); *BBC License Subsidiary*, 10 FCC Rcd at 10973-74, ¶¶ 22-25, *Amendment of Parts 20, 21, 22, 24, 26, 80, 87, 90, 100, and 101 of the Commission's Rules to Implement Section 403(k) of the Telecommunications Act of 1996,* Order, FCC 96-396, 11 FCC Rcd 13072 (1996)

[94] *See BBC License Subsidiary*, 10 FCC Rcd at 10973-74, ¶¶ 24-25

[95] *See id* at 10973-74, ¶ 25

[96] *See id* at 10973, ¶ 23, *see also Wilner & Scheiner I*, 103 F.C.C. 2d at 522, ¶ 19.

[97] Global Crossing currently holds its interests in Global Crossing North American Holdings, Inc through its Bermuda subsidiary Global Crossing Holdings Ltd Applicants state they expect Global Crossing Holdings Ltd to be dissolved upon the consummation of the proposed transaction, and thus do not provide a principal place of business showing for Global Crossing Holdings Ltd *See* December 18 Letter, *supra* note 10, at 4 Appendix C to this Order and Authorization presents the post-closing ownership structure

in EAN currently held by two individuals, and thus will own one hundred percent of EAN [98] Like Global Crossing, New GX is itself organized under the laws of Bermuda, a WTO Member [99] Applicants state that New GX, a newly-formed company, does not yet have commercial operations and will not have such operations until consummation of the proposed transaction [100] Applicants assert that New GX will have substantially the same principal places of business as Global Crossing.[101] Specifically, Applicants state that New GX, like Global Crossing, will not have a single principal place of business, but, once it succeeds to Global Crossing's assets and operations, will carry out its global business principally in countries that are WTO Members [102] On balance we find that New GX, like Global Crossing, principally will conduct its business in countries that are WTO Members [103] Therefore, pursuant to the *Foreign Participation Order*, New GX and GC Holdings are entitled to a rebuttable presumption that their proposed foreign ownership of Global Crossing North American Holdings, Inc., the U.S parent of the Title III licensees, does not pose a risk to competition in the U.S market that would justify denial of the Applications This presumption could be rebutted only if we were to find that grant of the Applications would pose a very high risk to competition in the U S market, where our general safeguards and other conditions would be ineffective at preventing harm to U.S. consumers.[104]

26 We next calculate the foreign equity and voting interests in Global Crossing North American Holdings, Inc that would be attributable to ST Telemedia and the Creditor Shareholders. As discussed in Section II C above, following consummation of the proposed transaction contemplated in the Purchase

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98 *See* August 18 Letter, *supra* note 62, at 2

99 *See Cable & Wireless USA Inc , Application for Authority to Operate as a Facilities-Based Carrier in Accordance with the Provisions of Section 63 18(e)(4) of the Rules Between the United States and Bermuda*, Order Authorization and Certificate DA 00-311, 15 FCC Rcd 3050, 3052, ¶ 7 (Int'l Bur 2000) (relying on an opinion provided by the U S Department of State that the 1994 Marrakash Agreement Establishing the World Trade Organization applies to Bermuda, a dependent territory of the United Kingdom)

100 *See* December 18 Letter, *supra* note 10, at 4

101 *See id* at 4-7 & 5 n 6, citing to *Global Crossing Ltd and Frontier Corporation, Applications for Transfer of Control Pursuant to Sections 214 and 310(d) of the Communications Act, as amended,* CC Docket No. 99-264, DA 99-1930 14 FCC Rcd 15911, 15919 ¶ 16 (WTB, Int'l Bur & CCB 1999) (finding that Global Crossing principally conducts business in countries that are WTO Members)

102 In providing a principal place of business showing for New GX, Applicants state that (1) Global Crossing and New GX both are formed under the laws of Bermuda, (2) the principal shareholders are entities from the United States or Singapore, both WTO Members, and most or all of the directors and officers of New GX are expected to be citizens of the United States or other WTO Members, (3) Global Crossing's Bermuda office is the headquarters for Global Crossing s holding company activities, although most of the senior executives and key employees of Global Crossing and its subsidiaries, and approximately 67% of employees, are based in the United States (4) the great majority of property is located in the United States and other WTO Member countries or in international waters and connecting WTO Members, and (5) the single largest source of Global Crossing's revenue is the United States *See* December 18 Letter, *supra* note 10, at 4-7, Third Amendment, *supra* note 1, at 7, 9-10

103 As noted above, *see supra* note 10, New GX will hold its interests in Global Crossing North American Holdings, Inc through GC Holdings Based on Applicants' representation that GC Holdings will not engage in commercial operations we find that GC Holdings will principally conduct its business in Bermuda or generally in countries that are WTO Members

104 *See Foreign Participation Order*, 12 FCC Rcd at 23913-14, ¶ 51

Agreement. ST Telemedia, a Singapore company, would acquire common and preferred stock equal to 61.5 percent of New GX's equity and voting interests, and the Creditor Shareholders would acquire common stock equal to 38.5 percent of New GX's equity and voting interests.[105]

27. *ST Telemedia*. We turn first to the proposed investment in New GX by ST Telemedia, a Singapore company. The Commission's attribution principles require that we attribute ST Telemedia's 61.5 percent equity and voting interests in New GX fully to Global Crossing North American Holdings, Inc., because Global Crossing North American Holdings, Inc. would be wholly owned and controlled by New GX. ST Telemedia is a direct wholly-owned subsidiary of Singapore Technologies, a Singapore-based conglomerate that, in turn, is a direct wholly-owned subsidiary of Temasek, a Singapore investment company that is wholly owned by the Government of Singapore.[106] Applying the five-factor principal place of business test, we find that ST Telemedia and its parent companies have their principal place of business in Singapore, a WTO Member.[107] ST Telemedia, Singapore Technologies, and Temasek are organized under the laws of the Republic of Singapore and headquartered in Singapore.[108] Seven out of eight of ST Telemedia's directors, and six out of its seven senior officers, are citizens of Singapore, which also is the country in which the majority of its tangible property is located, and the country from which it derives the greatest sales and revenues.[109] All of the directors and senior officers of Singapore Technologies, and all of the directors and four of the five senior officers of Temasek, are citizens of Singapore.[110] A majority of the property of each of Singapore Technologies and Temasek is located in Singapore, and both companies derive the largest portion of their revenues from their Singapore operations.[111] Therefore, ST Telemedia, Singapore Technologies, Temasek, and the Government of Singapore are entitled to a rebuttable presumption that their proposed indirect foreign ownership of Global Crossing North American Holdings, Inc. does not pose a risk to competition in the U.S. market that would justify denial of the Applications.[112]

28. The Commission also considers any relevant factors and evidence that might tend to rebut

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105 *See supra* ¶ 4.

106 *See* Petition for Declaratory Ruling, *supra* note 1, at 17.

107 As noted above, *see supra* note 27, ST Telemedia will hold its interest in New GX through Singapore and Mauritius subsidiaries. Applicants advise that the only business activity of STT Crossing Ltd. will be to hold the investments of ST Telemedia in New GX. *See* December 18 Letter, *supra* note 10, at 6 n.8; September 18 Letter, *supra* note 10, at 1. Based on this representation, we find that STT Crossing Ltd. will have its principal place of business in Singapore or Mauritius. Mauritius is a WTO Member. *See, e.g.*, www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (visited March 28, 2003).

108 *See* Petition for Declaratory Ruling, *supra* note 1, at 12; Third Amendment, *supra* note 1, at 7 n.12.

109 *See* Petition for Declaratory Ruling, *supra* note 1, at 17-18.

110 *See* Third Amendment, *supra* note 1, at 7 n.12.

111 *See id.*

112 We find that, because Singapore is a Member of the WTO, the Government of Singapore's indirect investment in Global Crossing North American Holdings, Inc. is properly treated as an investment from a WTO Member country.

the presumption that investment by individuals or entities from WTO Member countries generally raises no risk to competition in the U S market [113] IDT contends that the transfer of control of Commission licenses to New GX would raise "precisely the sort of 'exceptional circumstances' that rebut the presumption" because New GX would be "affiliated with carriers possessing market power in [Singapore and Indonesia], themselves affiliated with [the Government of Singapore] "[114] In the *VoiceStream/Deutsche Telekom Order*, the Commission stated that the existence and degree of control by a foreign government is relevant to determining the public interest under section 310(b)(4).[115] Here, for the reasons discussed below at paragraphs 31-32, we conclude that the Government of Singapore's indirect ownership interest in ST Telemedia, which will control transferee New GX, will not confer a unique financial advantage, or otherwise create a high risk to competition or consumers in the United States, that warrants conditions under section 310(b)(4) other than those adopted in this Order and Authorization.

29 The Applicants contend that government ownership of ST Telemedia poses no threat to competition in the United States [116] Applicants advise that the Government of Singapore does not have the right to consent to or veto the decisions of, or to hold a "golden share" in, ST Telemedia.[117] Applicants further advise that ST Telemedia functions as a competitive, commercial enterprise with a profit-maximizing objective [118] Applicants state that the Government of Singapore provides no subsidies or grants to ST Telemedia, but that ST Telemedia finances its investment activities through traditional commercial means [119] Applicants also state that ST Telemedia's workforce and the workforces of ST Telemedia's subsidiaries are not and never have been civil servants.[120] Finally, the Applicants note that ST Telemedia's operational subsidiaries in Singapore are subject to the regulatory oversight of the Info-

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113 *See Telenor Order* 16 FCC Rcd at 22909, ¶ 27 In this instance, four Congressional letters urge us to undertake a thorough review *See* Cong Wolf *Ex Parte*, *supra* note 58, at 2 (urging full and complete review of Hutchison Telecommunications Ltd 's then-proposed investment), Sen Dayton *Ex Parte*, *supra* note 58, at 1 (asking Commission to consider issues very carefully and to seriously consider any information provided in the record by the Department of Defense and Federal Bureau of Investigation), Sen Burns and Sen Hollings *Ex Parte*, *supra* note 58 at 1-2 (urging Commission not to expedite its review but to thoroughly probe the transaction, giving thorough consideration to Congressional intent regarding foreign ownership), Cong Weldon *Ex Parte*, *supra* note 58, at 1 (stating that proposed transaction must be reviewed with the strictest of scrutiny)

114 *See* IDT Petition to Deny Third Amendment, *supra* note 49, at 20

115 *See VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd at 9813, ¶ 56, *see also Telenor Order*, 16 FCC Rcd at 22909, ¶ 28

116 *See* Global Crossing Opposition to Petitions to Deny Third Amendment, *supra* note 52, at 7, 11-14 Applicants state that the FCC-Licensed Subsidiaries participate as non-dominant providers in U S markets that are highly competitive They state that consummation of the proposed transaction will not change the situation, because there will be no consolidation of U S network assets or of the U S interstate telecommunications market and because the Applicants have agreed to accept dominant treatment on the U S - Singapore route *See id* at 7-8

117 *See id* at 11

118 *See id* at 11

119 *See id* at 12

120 *See id*

communications Development Authority of Singapore (the "IDA") and that the IDA has issued over 600 licenses to provide facilities-based and services-based telecommunications, including licenses held by subsidiaries of U S telecommunications carriers.[121]

30 IDT replies that ST Telemedia's status as an indirect wholly-owned subsidiary of Temasek confers significant advantages not available to ST Telemedia's competitors[122] IDT states that Temasek is willing to use the assets of one of its companies to benefit another Temasek company.[123] IDT also suggests that the exercise of shareholder rights, including the right to appoint board members to the Temasek companies, results in government influence over ST Telemedia's commercial policy.[124]

31. For the reasons outlined below, we decline to adopt special conditions in this case. First, as the Commission stated in the *Foreign Participation Order*, the commitments made by WTO Members, the Commission's regulatory safeguards and antitrust law should adequately address competitive concerns resulting from participation by foreign carriers from WTO Member countries in the U.S. telecommunications market.[125] The Commission has confirmed that the presumption in favor of market entry for private entities from WTO Member countries also applies to an analysis of whether the denial of indirect investment by a WTO Member government would serve the public interest.[126] Upon review of the competitive issues raised by this transaction, we conclude that IDT has not provided sufficient evidence to rebut the presumption favoring investment by WTO Members. The Applicants state, in a

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121 *See id*

122 *See* IDT Reply to Third Amendment, *supra* note 56, at 7. IDT states that Temasek is a "massive investment holding company" wholly owned by the Ministry of Finance *See id*

123 *See id* at 8 (citing to a February 2002 press release about Temasek s exercise of its rights of mandatory exchange of guaranteed bonds issued by one Temasek subsidiary for shares of a second subsidiary). IDT contends that the use of the equity of one company to pay the debt of another company is a valuable financial advantage not available to ST Telemedia's competitors *See id*

124 *See id* at 9-10 IDT contends that Temasek and the Government of Singapore exercise influence over ST Telemedia through the appointment of board members including persons who are family members of government officials and including at least one key government official *See id* at 10-11 In particular, IDT states that Mr Tan Guong Ching is Permanent Secretary of the Ministry of Home Affairs and Chairman of the boards of directors of ST Telemedia and Singapore Technologies *See id* at 11 IDT also argues that links between the Temasek companies and the Government of Singapore raise the question whether there exist persons and entities that "are 'representatives' of the Singapore government for purposes of the Commission's foreign ownership analysis " *See id* at 10 In this regard, if IDT is making an argument that any government officials holding office in the Temasek companies are "representatives" under section 310(a), this argument fails because any such officials are not Commission licensees The Commission consistently has construed the term "representative," as applied to 47 U S C § 310(a), to prohibit individuals acting on behalf of or in conjunction with a foreign government from holding licenses under Title III of the Act *See VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd at 9808, ¶ 47 ("The Commission consistently has construed 'representative' of an alien or foreign government to apply to individuals 'acting on behalf of' or 'in conjunction with' the foreign entity," not to companies in which a government "allegedly influences management decisions ")

125 *See VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd at 9810-11, ¶ 51, *see also Telenor Order*, 16 FCC Rcd at 22909, ¶ 30

126 *See Telenor Order*, 16 FCC Rcd at 22909, ¶ 30, *see also VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd at 9810-11, ¶ 51

pleading certified under penalty of perjury as true, complete and correct by the Senior Vice President – General Counsel of ST Telemedia, that the Government of Singapore does not provide subsidies or grants to ST Telemedia, does not influence ST Telemedia's commercial policy, and will not influence the commercial policy of New GX and the FCC-Licensed Subsidiaries.[127] Notwithstanding IDT's allegations, we find no credible evidence that ST Telemedia receives any special benefits or has preferential access to capital by virtue of government ownership.[128]

32 Second, and perhaps most important, we are not persuaded that the indirect foreign corporate and government ownership of ST Telemedia raises in itself competitive concerns with respect to any of the product markets served by the FCC-Licensed Subsidiaries. Although IDT cites to a web page describing the corporate background of Temasek for the proposition that the Government of Singapore exercises its shareholder rights to influence the strategic direction of the Temasek investments, the record does not support a finding that the exercise of these shareholder rights would harm competition in the United States [129] As we note in the Competitive Effects section below, the acquisition of the FCC-Licensed Subsidiaries will not reduce competition within the U.S. market.[130] Rather than decreasing competition, the acquisition likely will result in the continued provision of interstate services by GCNAN and EAN Given these realities, it is highly unlikely that GCNAN or EAN could achieve market power in any U S product market, and any attempt by the Government of Singapore to aid GCNAN or EAN in

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[127] *See* Global Crossing Opposition to Petitions to Deny Third Amendment, *supra* note 52, at 11-12 & Certification of Pak Siok Lan, Senior Vice President – General Counsel, ST Telemedia (certifying that the statements with respect to ST Telemedia and its affiliates and subsidiaries are true, complete and correct). Moreover, although there is no record evidence that the proposed transaction will affect competition adversely in any input market essential for the provision of international services, including the market for international transport services, *see infra* ¶¶ 39-41 we note in passing that the government shares in Temasek are administered by the Ministry of Finance, an agency separate from Singapore's telecommunications regulator, the IDA.

[128] In fact, some equity investors and credit agencies cite government ownership as a negative factor in the cost of raising capital Government ownership can be a competitive disadvantage, particularly in the United States where efficiency is a key determinant of success because government-owned firms can be less efficient and less profitable *See VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd at 9816-17, ¶ 62 & n 185

[129] *See* IDT Reply to Third Amendment, *supra* note 56, at 9 citing "Corporate Backgrounder" (available at http //www temasekholdings com sg/temasek_news/corp_backgrounder/corporate_backgrounder-Jul03 htm (visited Sept 5, 2003) and attached as Attachment 2 of IDT's pleading) *See also VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd at 9820, ¶ 68 (under the *Foreign Participation Order*, the Commission focuses its analysis on competitive effects in U S markets) IDT also argues that the record is insufficient to provide a basis for concluding that the Government of Singapore will not influence the commercial policy of New GX and the FCC-Licensed Subsidiaries, and suggests that the Commission designate the Applications for hearing to establish a more complete record *See* IDT Reply to Third Amendment, *supra* note 56, at 12 IDT's pleading does not contain specific allegations of fact (or any supporting affidavit) sufficient to show that a grant of the Applications would be *prima facie* inconsistent with the public interest convenience and necessity Based on the record, we conclude that there are no substantial and material questions of fact to warrant the designation of a hearing *See Astroline Communications Company Limited Partnership v F C C*, 857 F.2d 1556, 1561-62 (D C Cir 1988). *See also* 47 U S.C. § 309(d)(1), (2) of the Act

[130] GCNAN holds 25 common carrier point-to-point microwave licenses *See* Petition for Declaratory Ruling, *supra* note 1, at 25 EAN which holds 20 common carrier point-to-point microwave licenses, provides voice and data services to business customers in western Massachusetts and New Hampshire *See* Fourth Amendment *supra* note 1, at 2 As noted, *see infra* ¶ 38, the transaction will not result in the concentration of market power in the U S domestic interstate markets served by GCNAN and EAN

such an endeavor would be likely to fail Anti-competitive activity succeeds if the market that is the object of such activity is susceptible to consolidation and maintenance of market power. To consolidate and maintain market power, a company would need to force the exit of competitors from a market and prevent the entry of new competitors Attempts at such exclusion would be unlikely to succeed.[131] Accordingly, we cannot find that the transfer of control of GCNAN and EAN to New GX as controlled by ST Telemedia presents a high risk to competition that warrants additional conditions under this section 310(b)(4) analysis.

33 *Creditor Shareholders* We next calculate the attributable foreign equity and voting interests in New GX that would be held by the Creditor Shareholders. Applicants advise that the identities of the Creditor Shareholders and the amount of New GX common stock that each Creditor Shareholder would receive have not been fully determined.[132] Nonetheless, Applicants provide a best effort estimate of anticipated creditor shareholdings [133] Applicants: (1) identified creditors of record for each of the four classes of creditors set out in the plan of reorganization approved by the bankruptcy court's *Confirmation Order*, (2) reviewed the names and business addresses of the creditors of record to determine which creditors in each class are from the United States, other WTO Members, or non-WTO countries; (3) divided the total dollar amount of the claims submitted by the non-U.S WTO Member creditors and non-WTO creditors in each class by the total dollar amount of the total claims for that class, to determine the approximate percentage of claims held by non-U.S. WTO Member and non-WTO foreign persons; and (4) multiplied that percentage by the percentage of New GX common stock to be granted to that class of creditors [134] The result is an estimate of the percentage of New GX common stock that would be issued to the non-U S Creditor Shareholders (from WTO and non-WTO countries) in each of the four classes of creditors [135] These calculations lead us to conclude that the vast majority of the creditor shares are likely to be held by individuals or entities from the United States or other WTO Member countries [136] Applicants state that no Creditor Shareholder is expected to obtain a ten-percent-or-greater voting or

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[131] A company seeking to drive out competitors by lowering price must have sufficient supply capacity to provide services to the bulk of its rivals' customers Otherwise rivals will not need to match price reductions to preserve their customer base GCNAN and EAN are only two of many common carriers that offer interstate voice and data services in the United States,

[132] *See* February 6 Letter, *supra* note 62, at 2

[133] *See id*

[134] *See id*

[135] *See id* at 2-3 Applicants acknowledge that this methodology is not precise because it assumes that all currently existing claims in a given class will be allowed, and advise that the process of objecting to certain claims and negotiating settlements with various creditors effectively will result in their removal as creditors and an increase in shares available to remaining creditors whose claims are allowed *See id* at 3 n 5.

[136] The information provided by Applicants in their February 6 Letter, *see supra* note 62, and in the Letter from Jean L Kiddoo and Paul O Gagnier, Counsel for Applicants, to Secretary, Federal Communications Commission (filed Feb 24, 2003) ("February 24 Letter"), suggests that all but 0 196% of the shares would be held by individuals or entities from the United States and other WTO Member countries *See* February 6 Letter, *supra* note 62 at Exhibits 1A-1D, as updated by February 24 Letter at Exhibit 1A (Revised) and Exhibit 1D (Revised).

equity interest in New GX.[137]

34. In summary virtually all of the indirect foreign equity and voting interests that would be held in Global Crossing North American Holdings, Inc by and through New GX and GC Holdings are properly ascribed to individuals and entities from WTO Member countries[138] Therefore, Applicants are entitled to a rebuttable presumption that the proposed indirect foreign ownership of GCNAN and EAN would not pose a risk to competition in the U S market that would justify denial of the Radio License Application and Fourth Amendment seeking to transfer control of the Title III common carrier licenses held by GCNAN and EAN. As discussed above, there is no credible evidence in the record that would rebut this presumption and, as we explain more fully in Section III.D below, the proposed transaction does not raise any significant competitive concerns.[139] We also determine in Section III.F below that the agreement between the Applicants and the Executive Branch addresses any national security and law enforcement concerns[140]

35. We do not grant ST Telemedia's request for "unlimited" indirect investment in GCNAN and EAN.[141] We require GCNAN and EAN to request specific Commission approval pursuant to section 310(b)(4) before ST Telemedia (through STT Communication Limited and STT Crossing Ltd.) and ST Telemedia's Singapore shareholders can acquire any additional equity or voting interest in New GX. We otherwise conclude that it will not serve the public interest to prohibit the proposed indirect foreign ownership of GCNAN and EAN, the Title III licensees. Specifically, this ruling permits GCNAN and EAN to be owned indirectly by (1) New GX (through GC Holdings) (up to and including 100 percent of the equity and voting interests), (2) ST Telemedia (through STT Communication Limited and STT Crossing Ltd) and ST Telemedia's Singapore shareholders, including Singapore Technologies, Temasek, and the Government of Singapore (up to and including 61.5 percent of the equity and voting interests);

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137 *See* February 6 Letter, *supra* note 62, at 6 *See also* Third Amendment, *supra* note 1, at Attachment H (no Creditor Shareholder will hold a 5% or greater interest in New GX).

138 Based on Applicants' data, approximately 0 196% of New GX's equity and voting interests would be attributed to individuals or entities from non-WTO Member countries *See supra* note 136 (0.196% non-WTO equity and voting interests from the Creditor Shareholders)

139 *See infra* at ¶¶ 36-41. *See also* OII Comments, *supra* note 51, at 7 (contending that the proposed indirect foreign investment by ST Telemedia will benefit U S employees and consumers as New GX deploys new services and builds out its network)

140 We note that ACNI and IDT assert that transfer of control of the FCC-Licensed Subsidiaries from Global Crossing to New GX raises national security concerns because of the foreign citizenship of ST Telemedia *See* ACNI Statement, *supra* note 39, at 17-20, IDT Petition to Deny Third Amendment, *supra* note 49, at 31-35 *See also* Sen Dayton *Ex Parte* at 1, Sen Burns and Sen Hollings *Ex Parte* at 1, Cong Weldon *Ex Parte* at 1 We find that the agreement between the Executive Branch and the Applicants addresses these concerns *See infra* at ¶¶ 46-51.

141 *See* Third Amendment, *supra* note 1, at 3 n 6 (seeking to amend the Petition for Declaratory Ruling to permit ST Telemedia "to hold an unlimited indirect interest" in GCNAN); Fourth Amendment, *supra* note 1, at 1 (requesting that the Petition for Declaratory Ruling be modified to permit EAN to have the foreign ownership described in the Third Amendment) Our approval in this Order and Authorization of indirect foreign investment in GCNAN and EAN pursuant to section 310(b)(4) shall not modify any requirement imposed on the licensees by other provisions of the Act or the Commission's rules to obtain prior approval for, or to notify the Commission of, changes in their ownership

and (3) various WTO Member Creditor Shareholders, each of which is permitted to hold a less-than-ten-percent equity and/or voting interest as finally determined under the plan of reorganization (up to and including an aggregate 38 5 percent of the equity and voting interests). In addition to these approved interests, New GX may accept up to and including an aggregate 25 percent indirect equity and/or voting interest from the WTO Member Creditor Shareholders, and from other foreign investors, without seeking prior Commission approval under section 310(b)(4), subject to the following conditions: (1) GCNAN and EAN shall obtain prior approval before any foreign individual or entity other than New GX (through GC Holdings), ST Telemedia (through STT Communication Ltd and STT Crossing Ltd.), Singapore Technologies, Temasek, and the Government of Singapore acquires individually a greater-than-25-percent indirect equity and/or voting interest in GCNAN or EAN: and (2) GCNAN and EAN shall seek approval under section 310(b)(4) before they accept any additional indirect investment, other than that approved here, from ST Telemedia, Singapore Technologies, Temasek and the Government of Singapore [142] We emphasize that, as Commission licensees, GCNAN and EAN have an affirmative duty to continue to monitor attributable foreign equity and voting interests and to calculate attributable interests consistent with the attribution principles enunciated by the Commission.[143]

D. Competitive Effects

36. Our public interest analysis includes an evaluation of the competitive effects of the proposed transaction in both the relevant product markets and the relevant geographic markets. For telecommunications service providers, the Commission has determined that the relevant product and geographic markets can include both U S domestic telecommunications services markets and telecommunications services between the United States and foreign points.[144] We determine that the

[142] In response to the ACNJ Objections to Third Amendment, *supra* note 50, at 3 & 3 n 5, suggesting that Hutchison Telecommunications Ltd may seek to acquire a 25% investment in New GX at some future date despite Executive Branch objections, we observe that the network security agreement between the Executive Branch and the Applicants, the provisions of which are incorporated as a condition to this Order and Authorization may not permit a 25% investment by Hutchison Telecommunications Ltd or another foreign entity *See infra* ¶ 47 & notes 190-91 (requiring New GX to give notice to the Executive Branch of any 10% or greater foreign investment and reserving an Executive Branch right to object under certain circumstances). *See also* Global Crossing Opposition to Petitions to Deny Third Amendment, *supra* note 52, at 16 n 44 (stating that Hutchison Telecommunications Ltd "will have no interest in New GX following consummation of the transaction")

[143] *See, e g , Vodafone Americas Asia Inc , Transferor, and Globalstar Corporation, Transferee, Consent to Transfer Control of Licenses and Section 214 Authorizations and Petition for Declaratory Ruling Allowing Indirect Foreign Ownership,* Order and Authorization, DA 02-1557, 17 FCC Rcd 12849, 12866, ¶ 53 (Int'l Bur 2002)

[144] *See, e g , VoiceStream/Deutsche Telekom Order,* 16 FCC Rcd at 9823, ¶ 78, 9825, ¶ 81, 9833, ¶ 97 *See also Application of WorldCom, Inc , and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc ,* Memorandum Opinion and Order, FCC 98-225, 13 FCC Rcd 18025 (1998) ("*WorldCom/MCI Order*"), *Lockheed Martin Corporation, Comsat Governmental Systems, LLC, and Comsat Corporation, Applications for Transfer of Control of Comsat Corporation and Its Subsidiaries, Licensees of Various Satellite, Earth Station, Private Land Mobile Radio and Experimental Licenses, and Holders of International Section 214 Authorizations,* Order and Authorization, File Nos SAT-T/C-20000323-00078 and SAT-STA-20000323-00078, FCC 00-277, 15 FCC Rcd 22910, 22915, ¶ 16 (2000) ("*Comsat/Lockheed Order*"), *erratum* DA 00-1789, 15 FCC Rcd 23506 (Int'l Bur 2000), *recon denied,* FCC 02-197, 17 FCC Rcd 13160 (2002): and *Application of General Electric Capital Corporation and SES Global S A for Consent to Transfer Control of Licenses and Authorizations Pursuant to Section 214(a) and 310(d) of the Communications Act and*
(continued)

proposed transfer is not likely to result in harm to competition in any relevant market and likely will yield tangible public interest benefits

37 We find that the instant case does not pose a threat of a reduction in the number of potential competitors in the geographic and product markets served by the FCC-Licensed Subsidiaries. Indeed, the Applicants submit that consummation of the proposed transaction would enable the FCC-Licensed Subsidiaries to continue to compete in the U S domestic and international telecommunications markets and to provide telecommunications services and facilities, including submarine cable capacity, to other telecommunications carriers and service providers.[145] CWA argues that the Applicants have not demonstrated a verifiable public benefit to competition from the continued viability of these subsidiaries [146] However, we find that the continued operation of the FCC-Licensed Subsidiaries will benefit competition by preventing discontinuance of service and providing consumers choices among providers of telecommunications services We give no weight to ACNI's suggestion that, because other entities have expressed an interest in acquiring Global Crossing's assets, the FCC Licensed-Subsidiaries are not in danger of disappearing [147] The *Confirmation Order* of the bankruptcy court approved the proposed transaction currently before us and we will not speculate on what other transactions the court might or might not have approved

38 No anti-competitive effects will result from this decision As the Applicants observe, the operating subsidiaries and affiliates of ST Telemedia do not provide U S interstate services, and thus the proposed transaction would not result in any increase in concentration of market power in the U.S. domestic interstate markets.[148] Further, the activities of the FCC-Licensed Subsidiaries and those of the

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Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, Order and Authorization DA 01-2100, 16 FCC Rcd 17575 (Int'l Bur & WTB 2001), Supplemental Order, DA 01-2482, 16 FCC Rcd 18878 (Int'l Bur & WTB 2001)

[145] *See* Petition for Declaratory Ruling, *supra* note 1, at 21-22, Third Amendment, *supra* note 1, at 6-7 Additionally, the Applicants advise that stabilizing the financial status of the FCC-License Subsidiaries will be beneficial to approximately 5000 employees *See* Third Amendment, *supra* note 1, at 10

[146] *See* CWA Comments, *supra* note 36 at 4 *see also* ACNI Statement, *supra* note 39, at 14-15.

[147] *See* ACNI Second Supplemental Letter, *supra* note 46, at 4

[148] *See* Petition for Declaratory Ruling, *supra* note 1, at 22-23, Third Amendment, *supra* note 1, at 7 With respect to domestic telecommunications services, the Commission separately analyzes the impact on competition in the product market for local exchange and exchange access services, and the product market for interexchange services *See, e g, MCI/WorldCom Order*, 13 FCC Rcd at 18040 n 61 Budget Call, Global Crossing Bandwidth Global Crossing Local Services, GCNAN, and Global Crossing Telecommunications (collectively, the "Domestic 214 Subsidiaries") provide domestic resold and facilities-based local exchange, intrastate, and interstate telecommunications services on a retail and wholesale basis in all fifty states and the District of Columbia. *See* Section 214 Application *supra* note 1, at Exhibit A, *see also* December 18 Letter, *supra* note 10, at 12 Each of the five Domestic 214 Subsidiaries provides both interstate and intrastate services, but only Global Crossing Local Services provides local exchange services which it provides as a competitive facilities-based carrier in 26 states *See December 18 Letter*, *supra* note 10, at 13. The Commission further distinguishes between domestic interstate interexchange services provided to (1) residential consumers and small businesses (mass market), and (2) medium-sized and large business customers (large business market) *See WorldCom/MCI Order*, 13 FCC Rcd at 18040 ¶ 24 The Applicants estimate that the Domestic 214 Subsidiaries collectively have a small percentage of the domestic mass market, on the order of less than one percent nationwide *See* December 18 Letter, *supra* note 10 at 12 In the large business market, the Applicants state that the Domestic 214 Subsidiaries are important competitive providers of telecommunications services to large enterprise customers, and provide service to over

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subsidiaries of ST Telemedia and its affiliates largely do not overlap in the U S international market.[149] Neither ST Telemedia's subsidiary StarHub, Inc. nor SingTel's subsidiary Singapore Telecom USA, Inc. has a significant market share on any U S route.[150] Moreover, the subsidiaries and affiliates of ST Telemedia outside the United States would not pose a risk of competitive harm on any U.S. route sufficient to warrant denial of the Applications. These subsidiaries and affiliates either do not control bottleneck facilities and otherwise do not have the ability to affect competition in the U S. telecommunications services market, or, in the case of the U S -Singapore and U S -Indonesia routes, their market power will be constrained by the Commission's dominant carrier regulation of the International 214 Subsidiaries on these routes.[151]

39 Our conclusion that the proposed transaction will not impact in any significant way the market for international long distance services is further supported by the absence of any evidence in the record to demonstrate that the proposed transaction would affect competition adversely in any input market that is essential for the provision of international services, including the market for international transport services [152] For purposes of determining whether the transaction would affect competition

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450 carriers in the United States *See id* at 13 In addition, as noted, wireless licensees GCNAN and EAN hold common carrier microwave licenses used to provide voice and data services *See supra* note 130.

149 *See* Petition for Declaratory Ruling, *supra* note 1, at 23, Third Amendment *supra* note 1, at 7. The Commission has distinguished between international services provided to mass market and larger business customers *See WorldCom/MCI Order*, 13 FCC Rcd at 18095, ¶ 122 For the international telecommunications market, the Commission also has evaluated the competitive effects on a country-by-country basis, for service between the United States and specific foreign countries, where service to each foreign country from the United States represents a separate geographic market *See Comsat/Lockheed Order* 15 FCC Rcd at 22916, ¶ 18.

150 *See* Petition for Declaratory Ruling, *supra* note 1, at 23 (stating neither StarHub, Inc nor Singapore Telecom USA Inc has a "remotely cognizable market share on any U S international route"), Third Amendment, *supra* note 1, at 7 (stating that StarHub, Inc has a "very small participation" in the U S telecommunications market) *See also, e g , 2001 International Telecommunications Data* Industry Analysis & Technology Division, Wireline Competition Bureau, Federal Communications Commission (Jan 2003), at Tables A1, A28 (reporting that StarHub, Inc billed only 499 046 of the 33 3 billion minutes of international message telephone service billed in the United States for year 2001, or less than 0 002%) We note that Singapore Telecom USA Inc 's section 43 61(a) filing for year 2001, submitted subsequent to publication of *2001 International Telecommunications Data*, reported 53 631,738 billed minutes representing less than 0 2% of total U.S billed international message telephone service minutes

151 *See* Petition for Declaratory Ruling, *supra* note 1 at 23-25 The Global Crossing subsidiaries that hold international section 214 authority are Budget Call, GC Bandwidth, Global Crossing Government Markets, Global Crossing Holdings USA, GCNAN, Global Crossing Telecommunications, International Optical Networks, L L C and Racal Telecommunications Inc (collectively, the "International 214 Subsidiaries"). *See* Section 214 Application, *supra* note 1, at 2 n 1 *See also infra* ¶¶ 42-45 of this Order and Authorization, concerning our regulatory treatment of the International 214 Subsidiaries to the extent that they are authorized to serve the U S -Singapore and U S -Indonesia routes

152 *See WorldCom/MCI Order*, 13 FCC Rcd at 18071, ¶ 81 (stating that the "Commission appropriately has tended to focus its analysis on particular inputs in considering competitive effects on international routes"), *see also Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, FCC 00-221, 15 FCC Rcd 14032, 14211, ¶ 395 (2000) (*"Bell Atlantic/GTE Order"*)

adversely in any input market that is essential for the provision of international services, we focus our analysis on submarine cable facilities.[153] Here, we analyze both capacity owned on cables landing in the United States and cable landing station ownership at the foreign end of U.S. international service routes.[154]

40. First, with respect to capacity owned on cables landing in the United States, we find that the proposed transaction will result in no appreciable increase in concentration of market power.[155] In the Atlantic Ocean and Americas regions, ST Telemedia and its affiliates do not own significant capacity on cables landing in the United States, and thus there is no appreciable post-transaction increase in concentration in either of those regions.[156] Similarly, in the Pacific Ocean region, we find no risk of

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[153] *See WorldCom/MCI Order*, 13 FCC Rcd at 18072-73, ¶¶ 82-83 (finding submarine cable capacity, but not satellite capacity, to be the transport medium that warranted review in that proceeding). *See also Bell Atlantic/GTE Order*, 15 FCC Rcd at 14211, ¶ 396 (focusing on submarine cable facilities).

[154] We note that ST Telemedia is not a cable landing station licensee at the U.S. end. We find that there will be no increase in concentration of power in the ownership of cable landing stations in the United States.

[155] The facilities operated by the Submarine Cable Subsidiaries of Global Crossing represent a significant, but not majority, share of cable capacity for cables landing in the United States. The FCC-Licensed Subsidiaries that hold U.S. cable landing licenses are GC Pacific Landing, Global Crossing Latin America & Caribbean, GT Landing, GT Landing II, MAC Landing, PAC Landing, and PC Landing (collectively, the "Submarine Cable Subsidiaries"). *See* Submarine Cable Application, *supra* note 1, at 2 n.1. Global Crossing Telecommunications, although initially listed in the Applications as a submarine cable landing licensee, subsequently has relinquished its interests in the Japan-U.S. ("JUS") cable landing license. *See Global Crossing Telecommunications, Inc. (Debtor-in-Possession)*, File No. SCL-MOD-20020522-00057, Public Notice, Actions Taken Under Cable Landing License Act, DA 02-2431, 17 FCC Rcd 18389, 18390-91 (Int'l Bur. 2002) (modifying the JUS submarine cable landing license to remove Global Crossing Telecommunications as a licensee). As a result, we will dismiss as moot File No. SCL-T/C-20020822-00070, which seeks to transfer control of Global Crossing's interests in the JUS cable landing license to New GX.

[156] In the Atlantic Ocean region, capacity in the Atlantic Crossing ("AC-1") and Atlantic Crossing-2 ("AC-2") cables represented approximately 26% of capacity available in 2001 on 17 transatlantic cables landing in the United States. *See International Bureau Report, 2001 Section 43.82 Circuit Status Data* (rel. Nov. 2002), at 34, Table 7, available on the Commission's website at www.fcc.gov/ib/pd/pf/csmanual.html (AC-1 and AC-2 cables had 3.6 million of the total 13.9 million 64 Kbps circuits in service in the transatlantic region). ST Telemedia's affiliate SingTel is an original capacity owner with 2,128 64 Kbps circuits on the Columbus II, TAT-12/13 and TAT-14 cables, or less than 0.02% of total transatlantic capacity for year 2001, not an appreciable post-transaction increase in market concentration. *See, e.g., American Telephone and Telegraph Company et al., Joint Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable System Between and Among the United States Mainland, Mexico, U.S. Virgin Islands, Spain, Italy and Portugal*, File No. ITC-93-029, Memorandum Opinion, Order and Authorization, DA 93-910, 8 FCC Rcd 5263, 5382, Appendix A Schedule E-3 (Columbus II section 214 authorization); *AT&T, et al., Joint Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Construct, Operate and Acquire Capacity in a High Capacity Digital Submarine Cable Network Between and Among the United States Mainland, the United Kingdom and France*, File No. ITC-93-062, Memorandum Opinion, Order and Authorization, DA 93-893, 8 FCC Rcd 4810, 4816, Appendix A (CCB 1993) (TAT-12/13 section 214 authorization), as updated by Revised Schedules, WDM Update Program (filed Aug. 26, 1998 and available in File No. ITC-93-062); *AT&T et al., Joint Application for a License to Land and Operate in the United States a Submarine Cable System Extending Between the United States, Denmark, Germany, the Netherlands, France and the United Kingdom*, File No. SCL-LIC-19990303-00004, Cable Landing License, DA 99-2042 (Int'l Bur., rel. Oct. 1, 1999) (TAT-14 cable landing license), at

(continued....)

harm to competition We therefore disagree with IDT's contention that the transaction will result in "consolidation of control of much of the undersea cable capacity in Southeast Asia by dominant carriers in that region" and thus "is likely to result in a substantial decrease in competition and an opportunity for the Applicants to restrict output and raise prices on certain Southeast Asian routes."[157] In 2001, capacity in PC-1 represented 20 2 percent of cable capacity that was available on 13 transpacific cables landing in the United States [158] ST Telemedia's affiliate SingTel is an original owner of capacity on three transpacific cables that land in the United States [159] Further, SingTel's subsidiary SingTelOptus owns

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Appendix B In the Americas region in 2001, capacity in the Mid-Atlantic Crossing ("MAC"), Pan American Crossing ("PAC"), and South American Crossing ("SAC") cables represented approximately 30% of submarine cable capacity that was available on 15 intra-Americas cables landing in the United States. *See International Bureau Report, 2001 Section 43 82 Circuit Status Data* at 34 (MAC, PAC, and SAC cables had 967,680 of the total 3 2 million 64 Kbps circuits in service in the Americas region) SingTel owns 30 64 Kbps circuits on the Americas 1 cable, or approximately 0 0009% of year 2001 total Americas region capacity. *See American Telephone and Telegraph Company et al , Joint Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable System Between and Among the United States Mainland, U S Virgin Islands, Brazil, Trinidad and Venezuela*, File No ITC-93-030, Memorandum Opinion, Order and Authorization, DA 93-911, 8 FCC Rcd 5287, 5295, Appendix A Schedule D-3 (CCB 1993) (Americas I section 214 authorization)

[157] *See* IDT Petition to Deny Third Amendment, *supra* note 49, at 18-21 IDT's contention rests in part on the faulty premise that Global Crossing "currently controls five undersea cable systems in the Pacific region " *Id* at 23 As noted below, *see infra* 158. GC Pacific Landing, a subsidiary of Global Crossing, has licenses to construct four small-capacity Pacific region cables, but the facilities remain unbuilt although the licenses transferred to GC Pacific Landing in 1999 *See Asia Direct Communications, L L C , et al , Application for Authority, Pursuant to the Submarine Cable Landing License Act, to Assign Cable Landing Licenses and to Transfer Control of the Entity Holding Such Licenses,* 14 FCC Rcd 11316, DA 99-1325 (Int'l Bur. 1999). A second, majority-owned indirect subsidiary of Global Crossing, PC Landing, owns the U S. end of the PC-1 cable linking the United States and Japan As noted, *see supra* note 63, consummation of the PC Landing bankruptcy reorganization is expected to divest the Applicants of any interest in PC-1.

[158] *See International Bureau Report, 2001 Section 43 82 Circuit Status Data, supra* note 156, at 35 (PC-1 cable had 967 680 of the total 4 8 million 64 Kbps circuits in service in the transpacific region). IDT argues that capacity in four unbuilt transpacific cables licensed to GC Pacific Landing must be included in the Commission's analysis of Pacific Ocean region capacity *See* IDT Reply to Third Amendment, *supra* note 56, at 15 Contrary to IDT's assertion an analysis of licensed, as opposed to operational, capacity in the Pacific Ocean region derives a significantly lower capacity percentage, for year 2001 and later, for the Submarine Cable Subsidiaries Aggregate transpacific submarine cable capacity licensed to the Global Crossing subsidiaries, including the four unbuilt cables, represents less than 10% of the capacity on transpacific cables licensed to land in the United States (Asia Direct, Guam Telecom, Hawaii Express and Orient Express cables are authorized at 10 Gbps each with an aggregate capacity of 483,840 64 Kbps circuits, which, along with the PC-1 capacity, equals less than 1 5 million of 15 4 million licensed circuits, including circuits licensed on the Flag Pacific-1, 360pacific, and Tycom Pacific cables that also were not yet operational in 2001). *See International Bureau Report, 2001 Section 43 82 Circuit Status Data, supra* note 156, at 37 This suggests that additional capacity, provided by several suppliers, will mitigate against an increase in concentration and prevent any anti-competitive effects in the Pacific Ocean region market

[159] SingTel owns capacity on TPC-5, a common carrier cable landing in the continental United States, Hawaii, Guam, and Japan, *see American Telephone and Telegraph Company, et al., Joint Application for Authorization Under Section 214 of the Communications Act of 1934, as Amended, to Construct, Acquire Capacity in and Operate a High Capacity Digital Submarine Cable Network Between and Among the United States Mainland, the State of Hawaii, the Island of Guam and Japan*, File No. ITC-92-179, Memorandum Opinion, Order and Authorization DA 92-1559, 7 FCC Rcd 7758, 7765, Appendix 2 Schedule C (CCB 1992) (continued)

capacity on Southern Cross, a common carrier cable between the United States and Australia, New Zealand and Fiji [160] We find that the approximately 5.5 percent increase in the concentration ratio resulting from the proposed transaction for transpacific cables landing in the United States, is not likely to have anti-competitive effects in the provision of U S international services.[161]

41 Second, with respect to cable landing stations at the foreign end of U S routes, the Applicants advise that all of Global Crossing's cable landing station subsidiaries have substantially less than a 50 percent share of the cable landing station market in their respective countries and do not control bottleneck facilities [162] In Singapore, ST Telemedia's affiliate SingTel, the dominant provider of domestic and international telecommunications services, owns three of the four cable landing stations, and therefore also is dominant in that input market [163] In Indonesia, ST Telemedia-controlled subsidiary Indosat, the dominant telecommunications provider, and its subsidiary PT Satelit Palapa Indonesia have

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(TPC-5 section 214 authorization) as updated in TPC-5 CN Revised Schedules Effective 1 June 1998, Schedule G-4 (memorandum and attachments from J Eric Stein, TPC-5 MC Coordinator, filed Aug 5, 1998 and available in File No ITC-92-179), China-U S , a private cable landing in the continental United States, Guam, China, Taiwan, Japan, and South Korea, *see AT&T et al , Joint Application for a License to Land and Operate in the United States a Digital Submarine Cable System Extending Between the United States, China, Taiwan, Japan, South Korea, and Guam*, File No SCL-98-002, DA 98-1711, 13 FCC Rcd 16232 (Int'l Bur 1998) (China-U S cable landing license) and China-US Cable Network Amendatory Agreement No 1 to the Construction and Maintenance Agreement, at Schedule C (available in File No SCL-98-002), and JUS a private cable between the United States and Japan, *see AT&T Corp et al , Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan*, File No SCL-LIC-19981117-00025 Cable Landing License, FCC 99-167, 14 FCC Rcd 13066, 13086, Appendix B Schedule B (1999) (JUS cable landing license) SingTel's ownership capacity, as described in the applications for the three cables approximates 68 464 64 Kbps circuits (4,980 circuits on TPC-5, 56,914 circuits on China-U S and 6,570 circuits on JUS), which represents 1.43% of capacity on transpacific cables landing in the United States in 2001 (68 464 of 4,787,370 circuits) *See International Bureau Report, 2001 Section 43 82 Circuit Status Data*, *supra* note 156 at 35

[160] SingTelOptus, an Australian subsidiary of SingTel that does not possess market power in Australia owns 39 99% of Southern Cross wet link capacity, or 193 488 circuits in 2001, representing 4% of transpacific capacity in year 2001 (193 488 of 4,787,370 circuits) *See e g MFS International, Inc , MFS Globenet, Inc and Pacific Carriage Limited, Application for Modification of License to Land and Operate in the United States a Submarine Cable System Extending Among the United States and Australia and New Zealand*, Modification of Cable Landing License DA 99-1713, 14 FCC Rcd 13912, 13913, ¶ 4 (Int'l Bur 1999), *see also International Bureau Report, 2001 Section 43 82 Circuit Status Data*, *supra* note 156 at 35 IDT refers to seven other Pacific Ocean region cables, none of which lands in the United States *See* IDT Petition to Deny Third Amendment, *supra* note 49, at Attachment A

[161] Attributing to ST Telemedia, solely for the purpose of this analysis the capacity held by SingTel and SingTel Optus for year 2001, or 261,952 circuits, *see supra* notes 159-60, and adding that capacity to PC-1's 967 680 circuits would result in a combined post-transaction ownership, by SingTel and New GX, of approximately 25 7% of operational transpacific cable capacity for year 2001 (1,229,632 of 4,787,370 circuits). This is not an appreciable increase over the 20 2% of operational capacity represented by PC-1 Moreover, as noted *see supra* note 158 substantial additional capacity that has come on line since 2001, provided by several suppliers, mitigates against any market concentration from the proposed transaction

[162] *See* December 18 Letter *supra* note 10, at 11 Each of these cable landing station providers is located in a WTO Member country *See id*

[163] *See id* at 11

market power in the cable landing station input market.[164] As we discuss further below, the Applicants have agreed to accept dominant treatment of the International 214 Subsidiaries on the U.S.-Singapore and U.S.-Indonesia routes.[165] We find that, with the dominant carrier safeguards we impose in this Order and Authorization, the proposed transaction will not affect competition adversely in any input market that is essential for the provision of international services, including the input market for international transport services.[166]

E. Dominant Carrier Safeguards

42. As part of our public interest analysis under section 214(a) of the Act, we also consider whether, upon consummation of the proposed transfers of control, the international section 214 authorization holders will become affiliated with a foreign carrier that has market power on the foreign end of a U.S. international route that the international section 214 authorization holders have authority to serve pursuant to the international section 214 authorizations that will be transferred.[167] In addition, under section 1.767(a)(8) and (a)(11) of the Commission's rules, a submarine cable licensee that proposes to transfer control of an interest in a submarine cable landing license granted pursuant to the Cable Landing License Act and Executive Order 10530 is required to disclose if it will become affiliated with a foreign carrier as a result of the transfer of control.[168] Under rules adopted in the *Foreign Participation Order*, the Commission classifies a U.S. carrier as "dominant" on a particular route if it is, or is affiliated with, a foreign carrier that has market power on the foreign end of that route.[169] With

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164 *See* January 30 Letter, *supra* note 32, at 2; *see also* First Amendment, *supra* note 1, at 2. Applicants also state that C2C (Hong Kong) Limited, a company owned 59.5% by SingTel, controls one of several cable landing stations in Hong Kong but, because there are several other providers of cable landing stations in Hong Kong, C2C (Hong Kong) Limited does not have market power in the provision of cable landing stations in Hong Kong. *See* December 18 Letter, *supra* note 10, at 11.

165 *See* Section 214 Application, *supra* note 1, at 19; Petition for Declaratory Ruling, *supra* note 1, at 24; December 18 Letter, *supra* note 10, at n.17; First Amendment, *supra* note 1, at 4.

166 Additionally, we find no merit in IDT's argument that we must consider the transfer of the assets of Global Marine Systems, Ltd., an unregulated Global Crossing subsidiary that plans and installs submarine cables, as a "new and substantial vertical risk" in our analysis of this transaction. *See* IDT Petition to Deny Third Amendment, *supra* note 49, at 33-34. As Applicants state, IDT has failed to explain how the transfer of these unregulated assets would affect competition in the U.S. telecommunications market. *See* Global Crossing Opposition to Petitions to Deny Third Amendment, *supra* note 52, at 8 n.27.

167 47 U.S.C. § 214(a).

168 47 C.F.R. §§ 1.767(a)(8), (a)(11); *see also* 47 U.S.C. §§ 34-39; Exec. Order No. 10530, § 5(a), *reprinted as amended in* 3 U.S.C. § 301.

169 *See Foreign Participation Order*, 12 FCC Rcd at 23987, ¶ 215, 23991-99, ¶¶ 221-39. A carrier classified as dominant on a particular U.S. international route due to an affiliation with a foreign carrier that has market power on the foreign end of the route is subject to specific international dominant carrier safeguards set forth in section 63.10 of the rules. *See* 47 C.F.R. § 63.10(c), (e). These safeguards are designed to address the possibility that a foreign carrier with control over facilities or services that are essential inputs for the provision of U.S. international services could discriminate against rivals of its U.S. affiliates (*i.e.*, vertical harms). In the *Foreign Participation Order*, the Commission concluded that these safeguards, in conjunction with generally applicable international safeguards, are sufficient to protect against vertical harms by carriers from WTO Member countries in virtually all circumstances. In the exceptional case where an application poses a very high risk to competition in the U.S. market -- where the standard safeguards and additional conditions would be ineffective -- (continued ...)

respect to submarine cable licensees, the Commission similarly applies competitive safeguards to a licensee that is, or is affiliated with, a carrier with market power in foreign input markets that could result in harm to competition in the U S market [170]

43 The Applicants state that neither Global Crossing nor New GX has received authority under section 214 of the Act.[171] The Applicants certify that neither the Applicants, the International 214 Subsidiaries, nor the Submarine Cable Subsidiaries are foreign carriers within the meaning of sections 63 09(d) of the Commission's rules.[172] The Applicants advise that Global Crossing, the International 214 Subsidiaries, and the Submarine Cable Subsidiaries currently are affiliated with foreign carriers in the following countries. Argentina, Belgium, Brazil, Canada, Chile, Denmark, France, Germany, Ireland, Italy, Mexico, The Netherlands, Norway, Panama, Peru, Spain, Sweden, Switzerland, the United Kingdom, Uruguay and Venezuela.[173] The Applicants further state that ST Telemedia is not a foreign carrier but has operating subsidiaries or affiliates that are foreign carriers. As a result of the proposed transaction, Applicants advise that the International 214 Subsidiaries and Submarine Cable Subsidiaries will acquire new affiliations with foreign carriers. The proposed investment by ST Telemedia would result in foreign carrier affiliations in the following countries: Australia, Hong Kong, India, Indonesia, Japan, Korea, Malaysia, Mauritius, Philippines, Singapore, Sri Lanka, Taiwan and the United Kingdom [174]

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the Commission reserves the right to deny the application *See Foreign Participation Order*, 12 FCC Rcd at 23913-14, ¶ 51 In circumstances where an affiliated foreign carrier possesses market power in a non-WTO Member country the Commission applies the ECO test, *see supra* ¶ 22, as part of its public interest inquiry under section 214(a) *See Foreign Participation Order*, 12 FCC Rcd at 23944, ¶ 124.

170 *See Submarine Cable Report and Order*, 16 FCC Rcd at 22180, ¶ 25 Relevant foreign carrier input markets include those facilities or services necessary for the landing, connection, or operation of submarine cables *See id* at 22180, ¶ 23 In the *Submarine Cable Report and Order*, the Commission found that these competitive safeguards should be sufficient in all but the most exceptional of circumstances to detect and deter any anti-competitive behavior associated with market power in WTO Member markets where U.S -licensed cable systems land and operate *See id* , *see also id* at 22174, ¶ 12, n 32 (noting that, pursuant to the *Foreign Participation Order*, 12 FCC Rcd at 23944-46, ¶¶ 124-130, an applicant proposing to acquire an interest in a U S. cable landing license that is affiliated with a foreign carrier that possesses market power in a non-WTO destination market of the cable is required to meet the ECO test as a prerequisite to grant of the cable landing license application)

171 *See* Section 214 Application, *supra* note 1, at 5.

172 *See id* at 7, Submarine Cable Application, *supra* note 1, at 8. *See also* 47 C F.R. § 1 767(a)(8) (*certification* includes an entity that owns or controls a cable station in any of the cable's destination markets); Note to § 1 767 (for submarine cable applicants, the terms "affiliated" and "foreign carrier" are defined as in § 63 09 except the term "foreign carrier" shall include any entity that owns or controls a cable landing station in a foreign market)

173 *See* Section 214 Application, *supra* note 1, at 7-8 and Exhibit C, Submarine Cable Application, *supra* note 1, at 8, Third Amendment, *supra* note 1, at 8 n.17 and Attachment G (removing Asia Global Crossing's affiliates in Hong Kong, Japan, Korea, Singapore, and Taiwan), Letter from Jean L Kiddoo and Paul O Gagnier, Counsel for Applicants, to Secretary, Federal Communications Commission (filed May 22, 2003) ("May 22 Letter"), at Exhibit 1 Attachment G (Revised)

174 *See* Section 214 Application, *supra* note 1, at 8 and Exhibit C; Submarine Cable Application, *supra* note 1, at 9 and Exhibit B, January 30 Letter, *supra* note 32, at 1-2, First Amendment, *supra* note 1, at 3-5 (continued)

44. The Applicants certify that they seek authority for the International 214 Subsidiaries to continue to provide international telecommunications services to all of the countries in which they have foreign carrier affiliates or with which they will have foreign carrier affiliates as a result of the proposed transaction.[175] Similarly, New GX certifies that it seeks authority for the Submarine Cable Subsidiaries to continue to provide international telecommunications services to all of the countries in which they currently have foreign carrier affiliates or with which they will have foreign carrier affiliates following consummation of the proposed transaction [176] The Applicants advise that each country is a WTO Member [177] The Applicants state that, following the consummation of the proposed transaction, the International 214 Subsidiaries and Submarine Cable Subsidiaries would qualify for a presumption of non-dominance under section 63 10(a)(3) of the Commission's rules with respect to the provision of service on all authorized routes except the U.S -Singapore and U.S -Indonesia routes, because their affiliates would lack 50 percent market share in the international transport and the local access markets on the foreign ends of these routes.[178] At the same time, the Applicants advise that, upon consummation of the proposed transaction, the International 214 Subsidiaries and Submarine Cable Subsidiaries would become affiliated with SingTel, a foreign carrier in Singapore, and with Indosat, a foreign carrier in Indonesia.[179] With respect to the U S -Singapore and U S.-Indonesia routes, New GX agrees to have the International 214 Subsidiaries classified as dominant pursuant to section 63.10 of the Commission's rules, and to file quarterly traffic reports pursuant to section 43 61(c) of the Commission's rules.[180]

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(including Indonesia following ST Telemedia's acquisition, through its subsidiary Indonesia Communications Limited, of a 41 94% controlling stake in Indosat), Third Amendment, *supra* note 1, at 8 n.17 and Attachment G (removing affiliations of Hutchison Telecommunications Ltd); May 22 Letter, *supra* note 173, at Exhibit 1 Attachment G (Revised) (adding Philippines)

[175] *See* Section 214 Application, *supra* note 1, at 8, First Amendment, *supra* note 1, at 3-4; Third Amendment, *supra* note 1, at Attachment G May 22 Letter, *supra* note 173, at Attachment G (Revised)

[176] *See* Submarine Cable Application, *supra* note 1, at 9, First Amendment, *supra* note 1, at 5, Third Amendment, *supra* note 1, at Attachment G, May 22 Letter, *supra* note 173, at Attachment G (Revised).

[177] *See* Section 214 Application, *supra* note 1, at 9, Submarine Cable Application, *supra* note 1, at 9 January 30 Letter, *supra* note 32, at 1-2 First Amendment, *supra* note 1, at 4 (advising that Indonesia is a WTO Member). May 22 Letter, *supra* note 173, at Exhibit 1 (advising that Philippines is a WTO Member)

[178] *See* Section 214 Application, *supra* note 1, at 9, Submarine Cable Application, *supra* note 1, at 10, December 18 Letter, *supra* note 10, at 10-11, January 30 Letter, *supra* note 32, at 2, First Amendment, *supra* note 1, at 3-5, May 22 Letter, *supra* note 173 at 1 (new affiliates of ST Telemedia, including Philippines affiliate Globe Telecom Inc , are non-dominant providers) *See also* 47 C.F R § 63 10(a)(3)

[179] *See* Section 214 Application, *supra* note 1, at 9, Submarine Cable Application, *supra* note 1, at 10, December 18 Letter, *supra* note 10, at 11 January 30 Letter, *supra* note 32, at 2, First Amendment, *supra* note 1, at 3-5, May 22 Letter, *supra* note 173, at 1

[180] *See* Section 214 Application, *supra* note 1, at 9, January 30 Letter, *supra* note 32, at 2, First Amendment, *supra* note 1, at 4, Third Amendment, *supra* note 1, at 7-8. *See also* 47 C F.R § 43 61(c). ACNI suggests that "the dominant position of applicants in the markets will jeopardize competition " *See* ACNI Statement, *supra* note 39, at 16-17 IDT asserts that ST Telemedia's affiliate SingTel might coordinate with ST Telemedia and New GX to maintain high termination rates for Singapore and Indonesia *See* IDT Petition to Deny Third Amendment, *supra* note 49, at 26 In the *Foreign Participation Order* the Commission carefully considered the ability and incentive of a foreign affiliate with market power to discriminate against rivals of its U S affiliates, and adopted specific international dominant carrier safeguards designed to address the possibility that a foreign carrier with control over essential inputs for the provision of U S international services would discriminate against (continued)

Further, New GX agrees to have the Submarine Cable Subsidiaries accept and abide by the reporting requirements set out in section 1 767(l) of the Commission's rules [181] These reporting requirements apply only to licensees affiliated with carriers with market power in a cable's destination market None of the cables covered by the submarine cable licenses at issue in this docket lands in Singapore or Indonesia, the only two markets where the Submarine Cable Subsidiaries will become affiliated with a carrier having market power. Thus because there is no basis in the record to impose special safeguards in this case the Submarine Cable Subsidiaries need not file the reports required by section 1.767(l).

45 We find that the Section 214 Application and Cable Landing Application, seeking to transfer control of international section 214 authorizations and interests in submarine cable licensees to New GX, are consistent with Commission policies on foreign carrier entry adopted in the *Foreign Participation Order* The dominant carrier safeguards in section 63 10(c) will protect sufficiently against any potential harms to U S customers on the two routes where the International 214 Subsidiaries will become affiliated with foreign carriers that possess market power Accordingly, and taking into account our findings below with respect to issues raised by the Executive Branch, we conclude that the proposed transfers of control of the international section 214 authorizations and submarine cable landing licenses from Global Crossing to New GX are consistent with our foreign carrier affiliation rules.

F. National Security, Law Enforcement, Foreign Policy and Trade Policy Concerns

46 When analyzing a transfer of control or assignment application in which foreign investment is an issue, we also consider any national security, law enforcement, foreign policy, or trade policy concerns raised by the Executive Branch [182] In their Applications, the Applicants stated that there were national security, law enforcement and public safety issues that Executive Branch agencies wanted to review and requested that Commission action be deferred until "all issues identified by the Executive Branch have or have not resolved" and appropriate action" is requested [183] In addition, as noted, on October 21, 2002, the DOJ/FBI filed the DOJ/FBI Motion requesting that the Commission defer dispositive action on the Applications until the Executive Branch had notified the Commission that the national security, law enforcement, and public safety issues under review by the Executive Branch agencies had or had not been resolved The DOJ/FBI now advises that the Executive Branch agencies have no objection to grant of the Applications provided that the Commission conditions the grant on compliance with the terms of an agreement between the Department of Justice, Federal Bureau of Investigation, Department of Defense and Department of Homeland Security, on one hand, and Global Crossing, New GX and ST Telemedia, on the other ("the New GX/Executive Branch Agreement"). Specifically on September 26, 2003, the DOJ/FBI filed, with the concurrence of the Department of Defense and Department of Homeland Security, a Petition to Adopt Conditions to Authorizations and

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rivals of its U S affiliates *See supra* note 169 We find that the remedy prescribed by the Commission's *Foreign Participation Order*, that of employing dominant carrier safeguards on routes where a carrier's affiliate at the foreign end of the route holds market power, resolves the stated concerns of ACNI and IDT

[181] *See* Submarine Cable Application, *supra* note 1, at 10 Petition for Declaratory Ruling, *supra* note 1, at 24, December 18 Letter, *supra* note 10, at 11 n 17, First Amendment, *supra* note 1, at 3 n.2. *See also* 47 C F R § 1 767(l) (reporting requirements applicable to licensees affiliated with a carrier with market power in a cable s WTO destination market)

[182] *See Foreign Participation Order*, 12 FCC Rcd at 23918, ¶ 59

[183] *See* Petition for Declaratory Ruling, *supra* note 1, at 20 *See also infra* note 184

Licenses ("Petition to Adopt Conditions") that attaches the New GX/Executive Branch Agreement.[184] The New GX/Executive Branch Agreement is intended to ensure that the Department of Justice, Federal Bureau of Investigation, Department of Defense and Department of Homeland Security and other entities with responsibility for enforcing the law, protecting the national security and preserving public safety can proceed in a legal, secure and confidential manner to satisfy these responsibilities.[185] The DOJ/FBI represents that the Applicants and ST Telemedia do not object to the grant of the petition.[186]

47 The New GX/Executive Branch Agreement includes, *inter alia,* provisions for information storage, access to facilities and data security, auditing, reporting and notice. The New GX/Executive Branch Agreement is attached as Appendix D to this Order and Authorization. In part, the New GX/Executive Branch Agreement provides that New GX and its subsidiaries will ensure that all "domestic communications infrastructure" will be located in the United States and directed, controlled, supervised and managed by a "domestic communications company".[187] The New GX/Executive Branch Agreement also requires New GX to maintain a full and complete record of every electronic or written communication -- related to interconnection agreements, security procedures and policy, major equipment purchases, and joint venture provisions -- by the New GX directors, officers, employees and agents with the ST Telemedia directors, officers, employees and agents.[188] Further, it requires the

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184 Petition to Adopt Conditions, IB Docket No 02-286 (filed Sept 26, 2003) The agreement, which the parties entered on September 24, 2003 is the result of discussions between Applicants and the Executive Branch to resolve national security and other concerns highlighted in the Petition for Declaratory Ruling, *see supra* note 1 at 20 (asking Commission to defer dispositive action on the Applications pending notification that all issues raised by the Executive Branch had or had not been resolved), and by the DOJ/FBI Motion filed on October 21, 2002, *see supra* note 38 (seeking deferral of Commission action for review of national security, law enforcement and public safety issues), Third Amendment, *supra* note 1, at 10 (reiterating Applicants' request for prompt review but no dispositive action until after DOJ/FBI notification) *See also* Letter from James L Ball, Chief, Policy Division International Bureau, Federal Communications Commission to Andrew D. Lipman, Jean L Kiddoo and Paul O Gagnier, Counsel for Applicants (dated Apr 22, 2003) (advising that review of the Applications could not be finalized by the requested date of April 30, 2003 without receipt of Executive Branch notification withdrawing the DOJ/FBI Motion in sufficient time to complete this review) ("Policy Division Letter") The Petition to Adopt Conditions advises the Commission that those Executive Branch agencies "have no objection to the FCC granting" the Applications "provided that the Commission conditions the grant" on compliance with the New GX/Executive Branch Agreement *See* Petition to Adopt Conditions at 1-2

185 *See* Petition to Adopt Conditions at 5 *See also id* at 3 (stating concern that foreign involvement in the provision of U S communications must not be permitted to impair the ability of the U S government to satisfy its obligations to U S citizens)

186 *See id*

187 *See* New GX/Executive Branch Agreement at Art 2 "Domestic communications infrastructure" does not include, among other things equipment dedicated to the termination of international undersea cables, provided that such equipment is utilized solely to effectuate the operation of undersea transport networks(s) outside of the United States and in no manner controls land-based transport network(s) or their associated systems in the United States *See id* at Art 1 11 A "domestic communications company" means a subsidiary or other component of New GX or any entity over which New GX has *de facto* or *de jure* control, that provides domestic communications *See id* at Art 1 10 Domestic communications is wire communications or electronic communications, whether stored or not, from one U S location to another U S location as well as the U S portion of a wire or electronic communication that originates or terminates in the United States *See id* at Art 1 9

188 *See id* at Art 3 3

establishment of a security committee of the New GX Board, as well as other security provisions including establishment of a visitation policy [189]

48 The notice provisions include a requirement that New GX promptly notify the Department of Justice, Federal Bureau of Investigation, Department of Defense and Department of Homeland Security of any foreign entity or individual, other than ST Telemedia, that obtains or likely will obtain a direct or indirect ownership interest above ten percent in New GX or a domestic communications company, or gains or likely will gain "control" of New GX or a domestic communications company.[190] The New GX/Executive Branch Agreement provides for suspension of the agreement with respect to New GX and all domestic communications companies thirty days after receipt from New GX of notice and documentation reasonably satisfactory to the Department of Justice, Federal Bureau of Investigation, Department of Defense and Department of Homeland Security that neither ST Telemedia nor any other foreign entity either controls New GX or a domestic communications company or holds, directly or indirectly, a ten percent or greater interest in New GX or a domestic communications company, unless these agencies notify New GX within thirty days that the agreement will not be suspended to protect U.S. national security, law enforcement and public safety concerns.[191] Finally, the New GX/Executive Branch Agreement states that the Attorney General, Secretary of Defense, and Secretary of Homeland Security shall not make any objection to CFIUS or the President concerning ST Telemedia's investment in New GX or grant of the applications filed with the Commission in IB Docket No. 02-286, provided that the Commission conditions grant of the Applications on compliance, by Global Crossing, New GX and ST Telemedia with the provisions of the New GX/Executive Branch Agreement.[192] In conclusion of the CFIUS process, on September 19, 2003, the President sent a letter to Congress attaching a classified report "on my decision to take no action to suspend or prohibit the proposed 61 5 percent investment by [ST Telemedia], a company indirectly owned by the Government of Singapore, in [New GX]."[193]

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[189] *See id* at Art 3 (including provisions, *inter alia*, on the development and maintenance of an information security plan, the qualifications of the principal network and security officers, general counsel and head of human resources, and the establishment of a security committee of the New GX Board). Articles 3.15-3 16 provide that 50% of the members of the New GX Board nominated by ST Telemedia must be security directors, that is directors who are U S citizens have or acquire U S security clearances, and satisfy the independent director requirements of the New York Stock Exchange *See id* at Art. 3.15-3 16 Within 30 days of receiving notice of the proposed appointment of an individual as a security director, the Department of Justice, Federal Bureau of Investigation, Department of Defense or Department of Homeland Security may object to the appointment, requiring rescission of the appointment and appointment of another candidate *See id* at Art. 3.16

[190] *See id* at Art 5 2 *See also id* at Art 1 3 (which defines "control" to include the power to reach certain decisions as well as *de facto* and *de jure* control) and at Art 1 5 (defining *de facto* and *de jure* control)

[191] *See id* at Art. 8 19

[192] *See id* at Art 7 3. Article 7 3 reserves a right to object if, *inter alia*, there is a material increase in the authority of a foreign entity to exercise control of New GX or other material change in the circumstances associated with the proposed transaction *See id* at Art 7.3 In addition, Article 7 2 reserves a right to object to the grant of applications or petitions of a domestic communications company for a license or other authorization under Title II or III of the Communications Act *See id* at Art 7.2

[193] *See* Letter from the President to the Speaker of the House of Representatives and the President of the Senate (dated Sept 19, 2003), available on www whitehouse gov/news/releases/2003/09/20030919-4 html (visited Sept 22, 2003)

49 In assessing the public interest, we take into account the record and afford the appropriate level of deference to Executive Branch expertise on national security and law enforcement issues.[194] As the Commission stated in the *Foreign Participation Order*, foreign participation in the U.S. telecommunications market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch[195] In presuming that an application from a WTO Member applicant does not pose a risk of anti-competitive harm that would justify denial of the application, the Commission does not, however, presume that an application poses no national security, law enforcement, foreign policy, or trade concerns[196] In the context of this particular proceeding, we considered these concerns independent of our competition analysis, and, at the request of the DOJ/FBI, we deferred action on the Applications[197] The Executive Branch, after raising national security and law enforcement concerns, now has resolved these concerns through the negotiation of the New GX/Executive Branch Agreement Therefore, on the record before us, we will not need to consider these particular concerns as a part of our own independent analysis of whether grant of the Applications is in the public interest[198] We recognize that separate from our licensing process, New GX has entered into the New GX/Executive Branch Agreement, and that the agreement expressly states that the Department of Justice, Federal Bureau of Investigation Department of Defense, and Department of Homeland Security will not object to grant of the pending Applications, provided that the Commission conditions grant of the Applications on compliance with the New GX/Executive Branch Agreement.[199] The Executive Branch has not otherwise commented on this proceeding

50 In addition, the resolution of the Executive Branch's concerns regarding national security and law enforcement addresses the concerns stated in the letters from Senator Dayton, Senators Burns and Hollings, and Congressman Weldon that the amended Applications might raise U.S. national security issues[200] Similarly, Executive Branch resolution of national security and law enforcement concerns also

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194 *See Foreign Participation Order*, 12 FCC Rcd at 23919-21, ¶¶ 61-66

195 *See* 12 FCC Rcd at 23919, ¶ 62

196 *See* 12 FCC Rcd at 23920-21, ¶ 65

197 *See, e g*, Policy Division Letter, *supra* note 184 (advising Applicants we would defer final review of the Applications until we received Executive Branch notification withdrawing the request to defer Commission action) XO and IDT argue that we should obtain public comment on the Executive Branch's national security and law enforcement findings before acting on the Applications *See* XO Comments, *supra* note 53, at 2 (arguing for new 180-day clock or additional comment period), IDT Petition to Deny Third Amendment, *supra* note 49, at 31-35 We disagree We have provided four sets of public comment periods in this proceeding, including a three-round comment period on the Third Amendment *See supra* ¶¶ 9, 11, 12, and 13 It has not been the Commission's policy or practice to seek public comment on the Executive Branch's national security and law enforcement determinations and XO and IDT fail to provide a compelling reason for doing so in this instance. *See Foreign Participation Order*, 12 FCC Rcd at 23920, ¶ 63 (Commission accords deference to Executive Branch on national security), *see also* Global Crossing Reply to XO Comments, *supra* note 14, at 3 ("XO fails to identify a single transaction in which the Commission has proceeded as XO suggests.")

198 *See Foreign Participation Order*, 12 FCC Rcd at 23919, ¶ 62

199 *See* New GX/Executive Branch Agreement at Article 7.1

200 *See* Sen Dayton *Ex Parte* at 1, Sen Burns and Sen Hollings *Ex Parte* at 1, Cong Weldon *Ex Parte* at 1

addresses the arguments of ACNI and IDT that the proposed foreign ownership of New GX could implicate national security issues[201]

51 We note that the New GX/Executive Branch Agreement contains certain provisions relevant to this transaction that, if broadly applied, would have significant consequences for the telecommunications industry These provisions, if viewed as precedent for other service providers and potential investors, would warrant further inquiry on our part, and we will consider any subsequent agreements on a case-by-case basis Notwithstanding these concerns about the broader implications of the New GX/Executive Branch Agreement, we see no reason to modify or disturb the agreement of the parties on these matters Therefore, in accordance with the request of the DOJ/FBI, in the absence of any objection from the Applicants, and given the discussion above, we condition our grant of the Applications on compliance with the New GX/Executive Branch Agreement.[202]

G. Other Issues

1. ACNI

52 ACNI states that, as a reseller of telecommunications services in the United States and abroad, it would be adversely impacted by the proposed transaction[203] ACNI advises that Global Crossing, through its subsidiary GC Bandwidth, is an ACNI investor that owns all of ACNI's Series A

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[201] *See* ACNI Statement, *supra* note 39 at 17-20 ACNI contends that the DOJ/FBI Motion "clearly calls into question the ability of the Commission to rule favorably on any public interest test under Sections 214(a) and 310(d) of the Act" *See id* at 18 IDT argues that the Commission should not approve the transaction before receiving Executive Branch findings regarding national security and comment of interested parties on those findings *See* IDT Petition to Deny Third Amendment *supra* note 49, at 31-35 We agree that it was correct to defer action in this proceeding until we received Executive Branch notification We do not agree that yet another round of public comments is required *See supra* note 197

Furthermore ACNI argues that installation of an oversight panel composed of U S citizens does not preclude the Commission from rejecting the transfer of control of the common carrier licenses *See* ACNI Second Supplemental Letter at 2 *citing Cellwave Telephone Services v F C C*, 30 F 3d 1533 (D C Cir 1994) and *Moving Phones Partnership v F C C*, 998 F 2d 1051 (D C Cir 1993), *cert denied*, 511 U S. 1004. The cited cases involved partnership arrangements in a proposed licensee that the Commission found to violate alien ownership requirements of section 310(b)(3) of the Act *See Cellwave Telephone Services*, 30 F 3d at 1534-35, *Moving Phones Partnership*, 998 F 2d at 1055 No such statutory violation exists here *See supra* note 81 (section 310(b)(3) is inapplicable to the Applications)

[202] We note that the New GX/Executive Branch Agreement provides first for informal resolution of any disputes *See* New GX/Executive Branch Agreement at Art 4 1 If any of the parties to the New GX/Executive Branch Agreement determines that further negotiation would be fruitless, Article 4 1 authorizes the party to resort to the remedies of Article 4 2 to enforce the New GX/Executive Branch Agreement *See id* Article 4 2 includes the right of a party to bring action for appropriate judicial relief and expressly does not limit the right of a U S government agency, *inter alia*, to request the Commission to modify, condition, revoke, cancel or render null and void any license, permit, or other authorization granted or given by the Commission to a domestic communications company, or request the Commission to impose other appropriate sanction such as a forfeiture *See id* at Art 4 2

[203] *See* ACNI Statement, *supra* note 39, at 3

convertible Preferred Stock [204] ACNI states that its stockholders' agreement reserves to ACNI a right of first refusal should GC Bandwidth seek to sell its interests in ACNI pursuant to a *bona fide* offer from a third party, but that Applicants have failed to offer the ACNI shares held by GC Bandwidth to ACNI [205] ACNI further states that this is "not a mere contractual dispute," but rather that its stockholder, carrier service, and security agreements with GC Bandwidth constrain ACNI's ability to compete freely in the marketplace, "thereby precluding the Commission's unqualified finding that the transfer proposed by Global Crossing is in the public interest "[206] ACNI seeks a Commission ruling that ACNI's authorization to provide service will not be affected by grant of the Applications, and urges the Commission either to deny the Petition for Declaratory Ruling or to declare that the exercise, by Global Crossing or its successors, of "any of the powers and options granted Global Crossing in connection with its purchase of preferred stock in ACNI, Inc . and transactions of this nature with other resellers," is not in the public interest [207]

53. Global Crossing replies that ACNI is using the proceeding in an attempt to exert pressure with respect to a dispute over unrelated contractual agreements, and contends that the Commission is not the proper venue for ACNI's contractual claims.[208] Global Crossing also contends that ACNI mischaracterizes the agreements between the parties, because, although ACNI has a right of first refusal if GC Bandwidth sells its holdings in ACNI, the proposed transaction will not result in the sale of the ACNI shares owned by GC Bandwidth and therefore will not trigger any right of first refusal.[209] Finally, Global Crossing agrees that approval of the proposed transaction will not affect the authorization previously granted to ACNI [210]

54. This proceeding is not the proper forum for interpreting the commercial contracts between Global Crossing and ACNI [211] We also clarify, as requested by ACNI and supported by Global Crossing,

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[204] *See id* at 5 ACNI states that Series A is a voting stock that currently represents 10% of ACNI's voting shares, *see id* at 7, and that GC Bandwidth holds one of nine ACNI board of director seats and has the right to designate one of three members of an audit committee of the board *See id* at 7-8 GC Bandwidth has the right to convert its preferred shares to common stock or debt *See id* at 8 A security agreement associated with the stock purchase agreement grants GC Bandwidth a security interest in the property of ACNI and its subsidiaries, and a carrier service agreement commits ACNI to purchasing capacity from Global Crossing *See id* The stock agreement also gives GC Bandwidth veto power over certain non-telecommunications business activities. *See id*

[205] *See id*

[206] *See id* at 5-6, *see also id* at 20 (alleging that "the disinclination of [Global Crossing] to honor the right of first refusal by [ACNI] may be read as a reflection of the Applicant's refusal to honor or recognize the contract laws of the United States")

[207] *See id* at 3, 21-24, *see also* ACNI Objections to Third Amendment, *supra* note 50, at 9-10 (arguing that Commission should qualify any declaratory ruling to prohibit Global Crossing from exercising any of the powers or options)

[208] *See* Global Crossing Further Reply to ACNI, *supra* note 47, at 1-2

[209] *See id* at 2

[210] *See id* at 4

[211] *See, e g , Regents of University System of Georgia v Carroll,* 338 U S 586, 602 (1950) (holding that the Commission is not the proper forum to litigate contractual disputes between licensees and others); *In re* (continued)

that grant of the instant Applications does not purport to affect ACNI's international section 214 authorization.[212] In all other respects, we deny the relief ACNI requests. In this regard, we deny ACNI's suggestion that we inquire further into the proceedings conducted by the U S bankruptcy court and CFIUS, as well as the alternative suggestion that we dismiss the Applications for failure to meet section 1 65 or 1.747 of the Commission s rules[213] We find without merit ACNI's arguments against the First Amendment filed by the Applicants[214] Further, we find without merit ACNI's argument that the Second Amendment filed by Applicants, now moot, was a major amendment requiring additional notice and comment[215] Additionally, we find no merit in ACNI's argument that Applicants are in violation of the

(Continued from previous page)

Applications of Arecibo Radio Corporation, Memorandum Opinion and Order, 101 F C C 2d 545, 548, ¶ 8 (1985) (because the Commission does not possess the resources, expertise or jurisdiction to adjudicate breach of contract questions fully, the Commission normally defers to judicial decisions regarding the interpretation of contracts). The record before us suggests that the issues ACNI raises in fact are disputes over private contractual rights between two parties that do not give rise to more general public interest concerns under the Act.

212 *See ACN Communication Services, Inc , International Telecommunications Certificate*, File No. ITC-214-20000203-00052, Public Notice International Authorizations Granted, Report No TEL-00194, DA 00-483, 15 FCC Rcd 4659, 4660 (Int'l Bur 2000) (ACNI's international section 214 authorization). We do not grant ACNI's request that we broaden our clarification to include "any similarly situated carriers' certificates," *see* ACNI Statement, *supra* note 39, at 3 and ACNI Objections to Third Amendment, *supra* note 50, at 9-10, as the record does not include information about any such additional carriers, nor do we reach the question of whether any such carriers are "estopped on the merits in respect of any future transfer of their certificates," *see id* , for the same reason

213 *See* ACNI Letter, *supra* note 46, at 1-2, 7, 47 C F R §§ 1 65 (requiring applicants to furnish additional or corrected information in a timely fashion), 1 747 (disallowing inconsistent or conflicting applications), *see also* Global Crossing Reply to ACNI Letter *supra* note 46 at 1 ("Applicants reaffirm that there have been no material changes to the information provided in the Application except as previously disclosed by Applicants ")

214 ACNI seems to construe the First Amendment, involving the Submarine Cable Application and Section 214 Application, as somehow also involving Title III questions *See* ACNI Further Comments, *supra* note 46, at 9-10, 12-15 ACNI also seems to suggest that, merely because the Commission sought further information from Applicants in a series of letters in this proceeding, Applicants failed to fully disclose, misrepresented, or deliberately concealed information *See id* at 11-12 Further, by focusing on Hutchison Telecommunications Ltd. and its major shareholder Hutchison Whampoa Ltd , *see id* at 15-18, instead of commenting on the Indosat transaction described in the First Amendment, ACNI s comments are not responsive to the Commission's February 20, 2003 public notice *See also* Global Crossing Further Reply to ACNI, *supra* note 47, at 1-2 (arguing Commission should reject ACNI Further Comments because they fail to raise any issue related to the affiliations placed on public notice) Finally, ACNI argues, with respect to each of Applicants' Anti-Drug Abuse Act certifications, that ACNI "would have difficulty in acknowledging its veracity" because Applicants cannot "certify under section 5301 that no officer or five percent (5%) owner is in violation of the Anti-Drug Abuse Act of 1988." *See* ACNI Further Comments at 20, *see also infra* note 216 In effect, the ACNI Further Comments are an untimely petition to deny the underlying Applications, unaccompanied by a motion to accept a late-filed pleading *See* 47 C F R §§ 1 45, 1 46 Although we have read and considered the ACNI Further Comments, we find nothing in the pleading that furthers our analysis of this transaction

215 *See* ACNI Second Supplemental Letter, *supra* note 46, at 2-3 We dismiss this argument and other arguments concerning the Second Amendment as mooted by the withdrawal of Hutchison Telecommunications Ltd from the Purchase Agreement and the substitution of ST Telemedia for Hutchison Telecommunications, Ltd., as set out in the Third Amendment, *supra* note 1

Anti-Drug Abuse Act [216]

2. Pending Applications

55 Applicants request that the transfer of control of the wireless licensees include authority for New GX, upon consummation of the proposed transaction, to control the following authorizations and filings (1) authorizations issued to GCNAN and EAN subsequent to the filing of the Applications but prior to consummation of the proposed transfers, (2) licenses held by GCNAN and EAN for facilities that have been constructed and are operational by the time the transfer is consummated and that may have been omitted from the Applications and (3) applications, notifications of minor modifications, and amendments thereto filed by GCNAN and EAN and pending at the time of consummation of the transfers [217] We conclude that any authorizations issued during the pendency of this proceeding or filed after the Applications and still pending at the time of the release of this Order and Authorization, any licenses that have been constructed and are operational by the time the transfer is consummated, and any applications, notifications of minor modifications, and amendments thereto pending at the time of consummation should be deemed to be covered by this Order and Authorization to the extent that they are listed in Appendix B Consistent with section 1 65 of the Commission's rules, Applicants should amend any current pending applications to reflect the transactions approved by this Order and Authorization [218]

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[216] *See* ACNI Further Comments, *supra* note 46, at 20 (alleging that any certification as to the investment by Hutchison Telecommunications Ltd now moot, would be insufficient), *see also* ACNI Second Supplemental Letter at 3 (arguing Applicants must certify compliance by Hutchison Whampoa Ltd directors), ACNI Objections to Third Amendment, *supra* note 50, at 7-8 (arguing that Applicants have not certified that all officers, directors and persons holding 5% or more of stock are eligible), Letter from William Malone, Gerard Lavery Lederer and James R Hobson Counsel for ACNI, to Secretary, Federal Communications Commission (filed July 2, 2003) ("ACNI Fifth Supplemental Letter"), at 1 (arguing that Applicants must identify every individual subject to certification) We note that Applicants have filed anti-drug abuse statements *See* Section 214 Application *supra* note 1, at 10 Submarine Cable Application, *supra* note 1, at 9, Radio License Application, *supra* note 1, at Form 603 Third Amendment, *supra* note 1, at Attachment H (providing certifications from Global Crossing New GX, and ST Telemedia and advising that no Creditor Shareholder will hold a 5% or greater interest in New GX), Fourth Amendment, *supra* note 1, at Form 603, Assignee/Transferee Certification Statements, *see also* Global Crossing Further Reply to ACNI, *supra* note 47, at 1-4 (stating that Applicants have provided anti-drug abuse certifications) Moreover we disagree with ACNI that the anti-drug abuse certifications are deficient because they do not identify specifically each officer and director of New GX and the Singapore companies that would control New GX *See* ACNI Fifth Supplemental Letter at 1 (arguing that the Commission is treating U S and foreign applicants differently) Applicants certifications are consistent with those provided by both U S and foreign applicants seeking to transfer control of the kinds of authorizations and licenses at issue in this proceeding. *See also* Global Crossing Opposition to Petitions to Deny Third Amendment, *supra* note 52, at 2 n.5 (stating that the certifications "are consistent with the certifications submitted in similar proceedings and routinely accepted by the Commission in both paper and electronic filings") Finally, it appears from the service list attached to the ACNI Fifth Supplemental Letter that ACNI did not serve all of the parties *See supra* note 41

[217] *See* Radio License Application, *supra* note 1, at Form 603, Exhibit C Applicants have provided updated information on this request *See* February 6 Letter, *supra* note 62, at 11 *See also* August 18 Letter, *supra* note 62, at 2

[218] 47 C F R § 1 65

IV. CONCLUSION

56 Based on the foregoing findings. we conclude, pursuant to section 310(b)(4) of the Act and Commission's precedent for indirect investment by WTO Members in U.S. common carrier licensees, that it would not serve the public interest to prohibit the proposed indirect foreign ownership, by and through New GX. of GCNAN and EAN, the Title III licensees Specifically. this ruling permits GCNAN and EAN to be owned indirectly by New GX (through GC Holdings) (up to and including 100 percent of the equity and voting interests). ST Telemedia (through STT Communication Limited and STT Crossing Ltd) and ST Telemedia's Singapore shareholders, including Singapore Technologies, Temasek, and the Government of Singapore (up to and including 61 5 percent of the equity and voting interests); and various WTO Member Creditor Shareholders, each of which is permitted to hold a less-than-ten-percent equity and/or voting interest as finally determined under the plan of reorganization (up to and including an aggregate 38.5 percent of the equity and voting interests) In addition to these approved interests, New GX may accept up to and including an aggregate 25 percent indirect equity and/or voting interest from the WTO Member Creditor Shareholders, and from other foreign investors, without seeking prior Commission approval under section 310(b)(4), subject to the following conditions: (1) GCNAN and EAN shall obtain prior approval before any foreign individual or entity other than New GX (through GC Holdings). ST Telemedia (through STT Communication Limited and STT Crossing Ltd.), Singapore Technologies. Temasek, or the Government of Singapore acquires individually a greater-than-25-percent indirect equity and/or voting interest in GCNAN or EAN. and (2) GCNAN and EAN shall seek approval under section 310(b)(4) before they accept any additional indirect investment. other than that approved here. from ST Telemedia. Singapore Technologies, Temasek and the Government of Singapore. We emphasize that. as Commission licensees, GCNAN and EAN have an affirmative duty to continue to monitor attributable foreign equity and voting interests and to calculate attributable interests consistent with the attribution principles enunciated by the Commission

57. We also conclude, pursuant to sections 214(a) and 310(d) of the Act and section 2 of the Cable Landing License Act, that the transfers of control are not likely to result in harm to competition in any relevant markets and likely will result in public interest benefits The amended reorganization plan, approved by the bankruptcy court. will allow the FCC-Licensed Subsidiaries to remain as valuable competitors and providers of telecommunications services We determine that the agreement between the Applicants and the Executive Branch addresses any national security and law enforcement concerns related to foreign investment in the transferee.

58 Accordingly. we approve the requested transfer of the international section 214 authorizations, domestic section 214 authority. common carrier and non-common carrier wireless licenses. and submarine cable landing licenses listed in Appendix B. subject to the requirements and conditions specified in this Order and Authorization

V. ORDERING CLAUSES

59. Accordingly, IT IS ORDERED that. pursuant to sections 4(i) and (j), 214(a), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U S C §§ 154(i) and 154(j), 214(a), 309, and 310(d) and section 2 of the Cable Landing License Act. 47 U.S.C. § 35. and Executive Order 10530, the Section 214 Application, Submarine Cable Application. and Radio License Application, as amended by the First Amendment, Third Amendment and Fourth Amendment filed by the Applicants in the above-captioned proceeding to transfer control of various licenses and authorizations listed in Appendix B to this Order and Authorization, ARE GRANTED to the extent specified in this Order and Authorization

60 IT IS FURTHER ORDERED that, pursuant to section 310(b)(4) of the Communications Act

of 1934, as amended, 47 U S C § 310(b)(4), the Petition for Declaratory Ruling IS GRANTED to the extent specified in paragraph 35 of this Order and Authorization

61 IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 214(a) and (c), 309 and 310(b), and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 154(j), 214(a), (c), 309, and 310(b), (d), and section 2 of the Cable Landing License Act, 47 U.S.C. § 35, the Petition to Adopt Conditions to Authorizations and Licenses filed by the DOJ/FBI on September 26, 2003, IS GRANTED and the declaratory ruling, authorizations and licenses granted herein are SUBJECT TO COMPLIANCE WITH the provisions of the New GX/Executive Branch Agreement attached hereto between Global Crossing, New GX and ST Telemedia on the one hand and the Department of Justice, Federal Bureau of Investigation, Department of Defense and Department of Homeland Security on the other, dated September 24, 2003, effective on the date when the transfers have closed, which New GX/Executive Branch Agreement is designed to address national security, law enforcement, and public safety issues of the Department of Justice, Federal Bureau of Investigation, Department of Defense and Department of Homeland Security regarding the authority granted herein. Nothing in the New GX/Executive Branch Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, section 222(a) and (c)(1) of the Communications Act, 47 U.S.C. § 222(a) and (c)(1), and the Commission's implementing regulations.

62 IT IS FURTHER ORDERED that, pursuant to section 214 of the Communications Act of 1934, as amended, 47 U S C § 214, and section 63.10 of the Commission's rules, 47 C.F.R. § 63.10, the International 214 Subsidiaries SHALL BE CLASSIFIED as dominant international carriers in their provision of services on the U S -Singapore and U S -Indonesia routes, and SHALL FILE the reports required by section 43 61(c), 47 C F.R § 43 61(c), as applicable.

63 IT IS FURTHER ORDERED that, pursuant to section 214 of the Communications Act of 1934, as amended 47 U S C § 214, section 2 of the Cable Landing License Act, 47 U.S.C § 35, and sections 63 24(e)(2), 63 18(h), 63 09(g), and 1.767(a)(8) and (11) of the Commission's rules, 47 C.F R. § 63 24(e)(2), 63 18(h), 63 09(g), 1 767(a)(8), (11), New GX SHALL FILE an updated interlocking directorate certification with the Commission within five business days after appointment of its board of directors and the boards of the International 214 Subsidiaries and Submarine Cable Subsidiaries or within five business days of the release of this Order and Authorization, whichever occurs later.

64 IT IS FURTHER ORDERED that File No SCL-T/C-20020822-00070, to transfer control of interests held by Global Crossing Telecommunications in the JUS cable landing license, IS DISMISSED AS MOOT for the reason stated herein at note 155

65 IT IS FURTHER ORDERED that ACNI's motion to extend the deadline to file replies IS DENIED in all respects for the reasons stated herein at paragraph 10

66 IT IS FURTHER ORDERED that the Gehman Letter and Newbridge Capital's pleadings ARE DISMISSED with prejudice for the reason stated herein at paragraph 10.

67 IT IS FURTHER ORDERED that the petitions to deny the transfers of control and oppositions to the petition for declaratory ruling, as amended, filed by CWA, ACNI, IDT, and XO ARE DENIED in all respects

68 IT IS FURTHER ORDERED that, pursuant to section 1 65 of the Commission's rules, 47 C F R § 1 65, the Applicants are afforded 30 days from the date of release of this Order and Authorization to amend all pending applications in connection with the instant Applications to reflect the

transfer of control approved in this Order and Authorization.

69 This Order and Authorization is issued pursuant to authority delegated by sections 0.261, 0 291, and 0 331, 47 C.F R §§ 0 261, 0 291, 0 331, and is effective upon release Petitions for reconsideration under section 1 106 or applications for review under section 1.115 of the Commission's rules, 47 C F R §§ 1 106, 1 115, may be filed within 30 days of the date of the release of this Order and Authorization *See* 47 C F R § 1 4(b)(2)

FEDERAL COMMUNICATIONS COMMMISSION

Donald Abelson
Donald Abelson, Chief
International Bureau

John Muleta
John Muleta, Chief
Wireless Telecommunications Bureau

William F. Maher, Jr.
William F Maher, Jr , Chief
Wireline Competition Bureau